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WISCONSIN REPORTS

151

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

OCTOBER 29, 1912—JANUARY 7, 1913

FREDERIC K. CONOVER
OFFICIAL REPORTER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - { LEVI H. BANCROFT (To Jan. 6, 1913); WALTER C. OWEN (From Jan. 6, 1913) }

Clerk - - - CLARENCE KELLOGG

SUPREME COURT RULES.

On January 11, 1913, Rules 17, 22, 23, 24, 39, 40, 41, and 62 of the Supreme Court were amended so as to read as follows:

RULE 17. At least twenty days before the time set for argument of the first assignment of cases on any calendar, the clerk shall send to every attorney appearing in the causes on the calendar for the term a list of such causes as arranged on the calendar.

RULE 22. On the August calendar shall be placed all causes in which the record shall have been filed before August 1st, and on the January calendar all causes in which the record shall have been filed before January 1st. Any case may be placed upon the calendar or advanced for hearing at any time in which it is shown that the interests of the state, the people at large, or of any municipality are affected, or any important constitutional question is seriously raised, or an extraordinary exigency is involved, and it is further shown that delay would be prejudicial to the accomplishment of justice. No appeal shall be placed upon the calendar unless the requirements of this rule be complied with, except as provided in Rule 62.

RULE 23. Actions and proceedings brought under the original jurisdiction of this court, commenced prior to either of the dates fixed for the filing of records in Rule 22, shall be placed upon the proper calendar.

RULE 24. Within ten days after each of the dates named in Rule 22 for the filing of records the clerk shall prepare and cause to be printed a calendar, arranging all civil causes by circuits, and placing first in order the circuit next succeeding in number to the first on the previous calendar, and arranging the criminal causes in their order at the foot.

RULE 39. A motion for a rehearing shall not be argued orally, but shall be submitted on printed arguments, of which fifteen copies shall be furnished to the clerk.

RULE 40. The printed arguments in support of the motion shall be served and filed within forty days after the decision, and in default thereof the motion shall be deemed to have been waived.

RULE 41. The printed arguments in opposition to the motion shall be served and filed within fifty days after the decision, at which date the motion shall be deemed to have been submitted.

RULE 62. Where, through mistake, inadvertence, or excusable neglect, the return upon appeal in any cause shall not be filed within the time limited by Rule 24, the court may, upon motion noticed for hearing on the first day of the term, place the cause on the calendar, on such terms as may be just.

The amendments to Rules 40 and 41 do not take effect until July 1, 1913.

ERRATUM.

VOL. 139.

Page 413, par. 3 in syllabus, line 5. For adequacy, read inadequacy.

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CASES DETERMINED

AT THE

August Term, 1912.

WARREN WEBSTER & COMPANY and another, Respondents, vs. BEAUMONT HOTEL COMPANY and others, Respondents, and NATIONAL SURETY COMPANY and another, Appellants.

September 19—October 29, 1912.

Building contracts: Bond of contractor: Liability of surety: Liens of subcontractors: Foreclosure: Action governed by general equitable rules: Statutes: Remedies: Parties: Pleading: Joinder of causes of action: Cross-complaint: Complete determination of rights and liabilities: Right of trial by jury.

1. Where a building contractor gave a bond with surety, conditioned that he would duly perform the contract and "pay and discharge all indebtedness that may be incurred in carrying out and completing said contract" and save the owner and building "free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof," these stipulations evinced a purpose and intent that the surety should secure payment for the material and labor furnished by the contractor, including that procured from third persons; and the latter were entitled to the benefit of such indemnity and could enforce their rights in all respects as if they had been parties to the contract and bond.
2. In such case a subcontractor is entitled to a lien upon the building and also to enforce, by action on the bond, the liability of the surety for payment of his claim.
3. Actions for the enforcement of mechanics' liens are equitable in character, and the procedure therein and the relief to be granted are governed by the general rules of practice in courts

of equity, except as modified by statute, and are not restricted or limited to the statutory regulations expressly provided.

4. The rights of the parties in such actions are to be enforced according to equitable remedies and the provisions of the statutes on the subject, whether they are plaintiffs or defendants.
5. Under the equitable rule as to parties, declared by sec. 2603, Stats. (1898), sureties upon the bonds of separate contractors, which are conditioned for the payment of all bills for materials and labor contracted to be furnished by their principals, may properly be joined as parties defendant, together with the owner and such principals and other lien claimants, in an action by subcontractors to enforce a lien upon the premises improved.
6. In such action the primary right sought to be enforced is the right to subject the property to the payment of the lienors' claims, and the liability of the sureties to pay them is a subject germane to the primary purpose of the action and may be determined and enforced therein.
7. Under sec. 2656*a*, Stats. (1898), the owner may properly, by cross-complaint in such action, set up the liability of the principal contractors and the sureties upon their respective bonds, they being codefendants in the action, and demand that they be required to pay the amounts due on such bonds into court, thereby relieving the premises to that extent from the liens claimed by the other parties to the action.
8. The fact that one contractor and his surety have no interest in the liabilities arising out of the contract and bond of another contractor on the same building, where all are made parties to a single lien action, does not create a misjoinder of parties or of causes of action.
9. In lien foreclosure suits the provisions of sec. 2883, Stats. (1898), giving the circuit court power "to determine the ultimate rights of the parties on each side, as between themselves, either on cross-complaint or equivalent pleadings or otherwise," and to grant to a defendant "any affirmative relief to which he may be entitled," are peculiarly applicable; and the liabilities of sureties upon contractors' bonds are sufficiently connected with the subject of the action to authorize the court to make a complete and final determination of the rights and liabilities of all parties, including a claim of the owner against the obligors upon one of such bonds for damages for nonperformance or for defective performance of the contract.
10. It is not a valid objection to the exercise of such jurisdiction that the parties are thereby deprived of the right to have the issues tried by a jury.

APPEALS from orders of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The complaint in this action alleges that the plaintiff *Warren Webster & Company,* as a subcontractor of Martin & Wigman, has a lien for labor and materials used in the construction of the Beaumont hotel, and that the plaintiff *Krueger,* as a subcontractor of the *Kirkman Construction Company,* has a similar lien upon the same property. The various statutory requirements for the establishment of liens are alleged.

It appears that on October 4, 1909, Martin & Wigman entered into a contract with the *Beaumont Hotel Company* to install in the Beaumont hotel at Green Bay, Wisconsin, the Webster system of steam circulation, and on December 23, 1909, a bond was executed by Martin & Wigman and *J. H. M. Wigman* as surety with the hotel company, conditioned that if the contractors should fully perform all the conditions of the contract with the hotel company, and "duly and promptly pay and discharge all indebtedness that may be incurred in carrying out and completing said contract, and save said building and the *Beaumont Hotel Company* free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof," then the obligation was to be void. On June 9, 1910, *Warren Webster & Company* contracted with Martin & Wigman to install the Webster system of steam circulation in the hotel.

In behalf of the plaintiff *H. W. Krueger* the complaint alleges that on November 1, 1909, the *Kirkman Construction Company* entered into a contract with the hotel company to furnish the materials and to perform the work in the erection, construction, and rebuilding of the Beaumont hotel, except as such work and materials were covered by the contract between the hotel company and Martin & Wigman. On the same day the construction company and the *National Surety Company* as surety executed a bond in favor of the hotel com-

pany containing the same conditions as the bond previously executed by Martin & Wigman and *J. H. M. Wigman* with the hotel company. The plaintiff *Krueger* furnished materials and performed labor in the construction of the hotel under a contract with the *Kirkman Construction Company.*

The complaint also alleges that on or about September 1, 1909, the hotel company executed a trust deed or mortgage to *W. P. Wagner* as trustee. It is alleged that the execution and delivery of this trust deed was subsequent to the commencement of the work of reconstruction, remodeling, and rebuilding of the hotel, and that the trustee had notice that the work of rebuilding had commenced when the trust deed was executed.

The complaint also sets out the interests and claims for liens of other subcontractors, in so far as they had been filed. The plaintiffs ask that the demands of all persons who have filed liens upon the premises be ascertained and that the interest of the hotel company at the time of the commencement of the work and of the furnishing of materials, and of any person claiming under such interest, may be sold to satisfy the liens and costs of the action, and that the plaintiff *Krueger* have judgment in case of a deficiency against the defendants the *Kirkman Construction Company* and the *National Surety Company,* and the plaintiff *Warren Webster & Company* have a deficiency judgment against *A. B. Martin* and *J. B. Wigman* of the firm of Martin & Wigman, and against *J. H. M. Wigman,* the surety on their bond to the hotel company.

The answer of the hotel company admits that the plaintiff *Warren Webster & Company* furnished material and performed labor under its contract with Martin & Wigman, but alleges that it was obliged to purchase some material under its contract with Martin & Wigman. It also alleges that Martin & Wigman agreed to take $2,000 of its bonds in partial payment of their contract and that the plaintiff agreed to take $1,000 of the hotel company bonds from Martin & Wig-

man. It is alleged that it is ready to deliver the bonds to the plaintiff, but that the plaintiff is unwilling to take them.

As to the cause of action alleged by *H. W. Krueger,* the answer of the hotel company admits the allegations made separately in his behalf. It is alleged that the trust deed to *W. P. Wagner* was given and recorded prior to the commencement of any work or the furnishing of any material under the *Kirkman Construction Company* or the Martin & Wigman contracts, and that these contractors and the subcontractors under them had notice thereof.

The cross-complaint of the hotel company alleges the contract with the *Kirkman Construction Company* for the construction of the hotel and the execution of the bond by the *National Surety Company* to secure the execution of the contract. It is alleged that before completion of the contract the work was abandoned by the *Kirkman Construction Company* and that in accordance with the terms of the contract the building was completed by the hotel company. It is alleged that after the abandonment it cost the hotel company $11,105.35 to complete the work and furnish the materials under the contract; that damages for defective work and irremediable defective material and for liquidated damages were sustained by the hotel company in the further sum of $14,257.20; and that approximately $10,000 was due subcontractors from the *Kirkman Construction Company* at the time the contract was abandoned, that this amount is still owing, and that mechanics' liens therefor, which the *Kirkman Construction Company* and the *National Surety Company* are obligated to pay, have been filed against the property of the hotel company; and it is alleged that of the sum of $70,000 to be paid the *Kirkman Construction Company* for construction and materials all has been paid except $4,912.73 in cash and $12,000 in hotel company bonds. The hotel company demands judgment that *Warren Webster & Company* be required under their contract to accept hotel company

bonds in settlement of their claim; that the claims for liens of the various subcontractors under the *Kirkman Construction Company* may be ascertained and determined; that the *Kirkman Construction Company* and the *National Surety Company* be adjudged primarily liable therefor and be required to pay the same into court; that the hotel company have judgment for $21,449.82 and costs of the action against the *Kirkman Construction Company* and the *National Surety Company;* and that upon payment of these amounts the *Kirkman Construction Company* and the *National Surety Company* be entitled to the $12,000 hotel company bonds.

The answer and cross-complaint of the trustee for the hotel company is substantially the same as the answer and cross-complaint of the *Beaumont Hotel Company.* He asks that the trust deed be declared and held a prior and superior lien to those of the subcontractors, that the principals and sureties on the bonds for construction be ordered to pay the liens of the subcontractors, and that the hotel property be liable to the liens of the subcontractors and be sold and the proceeds of the sale be applied to discharge the liens only in the event and to the extent that such subcontractors be not paid by the principals and the sureties on the bonds.

The answers and cross-complaints of those of the defendant lienors who answered allege in substance that they were subcontractors and as such furnished materials and performed labor in the construction of the hotel building under the contracts, that they have filed claims for liens for the amount of their claims, that the principal contractors have failed to pay them, and that the bondsmen are liable for the amounts of their claims; and they ask that the rights of all persons having liens on the premises may be ascertained and determined, whether they be plaintiffs or defendants, that the premises subject to the liens be sold to satisfy the liens so ascertained and the costs, and in case of a deficiency that they have personal judgment against the parties liable on the demands for which the liens are claimed.

The *National Surety Company* demurred to the complaint of the plaintiffs on the grounds that several causes of action had been improperly united, that the complaint did not state a cause of action against it, that no cause of action in favor of *H. W. Krueger* was stated against it, that the complaint did not state facts sufficient to constitute a cause of action against it and in favor of the plaintiff *Warren Webster & Company,* and in that *Warren Webster & Company* was made a party plaintiff and did not state a cause of action against it, that there was a misjoinder of parties in that subcontractor lien claimants were made parties defendant with it, and that the court had no jurisdiction because the action is one in equity for the foreclosure of mechanics' liens and in such an action the court had no jurisdiction of a cause of action at law against the defendant.

The *National Surety Company* demurred to the cross-complaints of the defendant subcontractor lien claimants on the grounds that such cross-complaints did not state facts sufficient to constitute cross-complaints against it, that the court had no jurisdiction because the action was one in equity for the foreclosure of mechanics' liens and the cross-complaints stated causes of action at law, that the cross-complaints do not state facts sufficient to constitute causes of action against it, that the causes of action stated are not pleadable as cross-complaints in the action, that there was a defect of parties in that the plaintiff *Warren Webster & Company,* making no claim against it, was improperly joined as a party plaintiff against it, that *A. M. Duncan,* trustee in bankruptcy for Martin & Wigman, not claiming to have a cause of action against it and not being liable with it, was improperly joined as a party to the action, and that the cross-complaints state no cause of action against it, in that the cause of action alleged does not affect or involve the contract, transaction, or property which is the subject of the action and is not pleadable in or as a cross-complaint.

The *National Surety Company* and the *Kirkman Construc-*

tion Company each demurred to the cross-complaint of the *Beaumont Hotel Company* on the grounds that, the cause of action alleged against them in the cross-complaint being an action at law and the complaint being an action in equity for the foreclosure of mechanics' liens, the court had no jurisdiction of the cause of action alleged in the cross-complaint, that the cause of action stated in the cross-complaint was not pleadable in the action, that there was a defect of parties in that the plaintiff *Warren Webster & Company,* alleging no cause of action against either of them, was improperly joined as a party plaintiff in the complaint and in the cross-complaint, that the trustee in bankruptcy for Martin & Wigman, alleging no cause of action against either of them and not being liable with either of them, was improperly joined in the cross-complaint as a party to the action, that the facts alleged as a cause of action in the cross-complaint do not constitute a cross-complaint against them because it does not involve or affect the contract, transaction, or property which is the subject matter of the action and is not pleadable as a cross-complaint or in the cross-complaint, and that the cause of action alleged does not constitute a cause of action, and because several causes of action have been improperly united.

All of the demurrers were overruled. The appeals are from the orders overruling the demurrers.

For the appellants there was a brief by *Thompsons, Pinkerton & Jackson,* and oral argument by *J. C. Thompson.*

For the plaintiff respondents the cause was submitted on the brief of *Cady, Strehlow & Jaseph.*

For the respondents *Beaumont Hotel Company* and *W. P. Wagner,* trustee, there was a brief by *Sol. P. Huntington,* attorney; a separate brief for the *Beaumont Hotel Company* by *George G. Greene;* and oral argument by *Mr. Huntington.*

For the several respondent lien claimants there was a brief signed by *Nath. Pereles & Sons; Sheridan, Evans & Merrill; James H. McGillan; Cady, Strehlow & Jaseph; Minahan &*

Minahan; Kittell & Burke; and *Greene, Fairchild, North, Parker & McGillan;* and oral argument by *J. R. North* and *E. R. Minahan.*

SIEBECKER, J. The questions raised by the different demurrers to the complaint and the cross-complaints of the *Beaumont Hotel Company* and the subcontractors as lienors may be treated together, because the same subjects are involved in their consideration and decision. In natural sequence, the question of the nature and extent of the liability of the sureties under the bonds given by them to the principal contractors to secure performance of the contracts for the construction of the hotel, and the nature of the action for the enforcement and foreclosure of the alleged liens, should be first considered.

1. The complaint alleges that to secure the faithful performance of the contract of the *Kirkman Construction Company* with the *Beaumont Hotel Company* to furnish the material and perform the work therein specified for the construction of the hotel, the construction company as principal, and the defendant *National Surety Company* as surety, on November 1, 1909, made a bond binding themselves to pay the hotel company the sum of $35,000, conditioned that if the construction company should duly perform the contract with the hotel company for furnishing the material and performing the labor agreed upon, and "shall duly and promptly pay and discharge all indebtedness that may be incurred in carrying out and completing said contract, and save said building and the *Beaumont Hotel Company* free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof, then this obligation shall be void, otherwise to remain in full force and effect." The bond of the surety, *J. H. M. Wigman,* to secure the performance of the contract of Martin & Wigman contained provisions of like effect. Confessedly, both of the principal contractors failed to perform their contracts. This failure imposes the obliga-

tion on the bondsmen to "pay and discharge all indebtedness that may be incurred in carrying out and completing said contract" and to save the hotel property and the hotel company "free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof." This undertaking is in no sense modified or restricted by the terms of the construction contracts of the parties, wherein the construction company agrees, in consideration of sums agreed upon, to furnish all the material and labor embraced in the contracts, to pay for the same, and to furnish written vouchers showing such payment or waiver of claim or lien therefor, and if through default in these conditions any liability should be incurred by the hotel company, then the sureties were to indemnify and make whole the hotel company on account thereof. These stipulations of the contracts and bonds clearly mean and evince a purpose that the parties thereby intended that the sureties should secure payment for the material and labor furnished by the contractors. Obviously, the parties understood that in the course of affairs such an obligation would cover the material and labor secured from third parties by the contractors. Under such circumstances, third parties furnishing labor and material obtain the benefit of such indemnity, and they can enforce their rights in all respects as if they had been parties to the contracts and bonds. The rights and liabilities of the principal contractors, the sureties, and the persons furnishing material and labor within the terms of the transactions covered by the construction contracts and bonds have on several occasions recently been considered in this court and need no further amplification here. See the following cases and the cases cited therein sustaining the right of such third persons to enforce the obligation against the bondsmen: *United States G. Co. v. Gleason,* 135 Wis. 539, 116 N. W. 238; *R. Connor Co. v. Ætna Ind. Co.* 136 Wis. 13, 115 N. W. 811; *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440; *Johnston v. Charles Abresch Co.* 123 Wis.

130, 101 N. W. 395. Under the facts and circumstances of the case, the subcontractors who have unpaid claims for material and labor furnished in the construction of the hotel and embraced in the provisions of the construction contracts are entitled to liens therefor on the hotel property, and they are entitled to enforce the liability of the sureties upon their bonds for payment thereof by action against the sureties.

2. It is contended by the appellants that the action for the enforcement of mechanics', laborers', and materialmen's liens is a remedy provided by statute, which prescribes the rules of pleading and the procedure therein, and that the regulations on these subjects in the lien statutes exclude any intention that such actions are to be governed by the established rules in equitable proceedings other than those specifically included in the statutes. This contention is based on the provisions prescribing what claimants may be made parties to the action (sec. 3321, Stats. 1898), what allegations of fact shall make a sufficient complaint (sec. 3322, Stats. 1898), what shall be embraced in the judgment for a sale of the premises and the distribution of the proceeds, and whether there shall be personal judgments in case of a deficiency or for want of establishing a lien on the property (sec. 3324 to sec. 3326, Stats. 1898). The contention that the right to a lien being created by a statute which prescribes the procedure to enforce it shows an intention that the remedy is to be restricted and limited to the statutory regulations provided, is not sustained. The statute (sec. 3323, Stats. 1898) by express provision declares that such an action shall be deemed equitable. This negatives the implication that it is to be restricted to the statutory procedure expressly provided. The statutory regulations concerning pleading and practice in the action to enforce the lien are to be treated as regulative of those parts of the equitable proceeding and do not exclude the right to apply equitable procedure in all other respects so far as the facts and circumstances of the case may require to adjudicate upon the rights

of all parties thereto. The remedy for foreclosing the lien is equitable in its nature and characteristics, and makes the action inherently an action in equity. The nature of the relief to be granted is such as the courts of equity award and such as can be most readily administered under their procedure. That statutory regulation of the pleading and practice in lien suits does not provide a complete code of procedure, and that equitable rules unless modified by statute are applicable, is recognized in the following cases: *Huse v. Washburn,* 59 Wis. 414, 18 N. W. 341; *Bartlett v. Clough,* 94 Wis. 196, 68 N. W. 875; *Willer v. Bergenthal,* 50 Wis. 474, 7 N. W. 352; *Charles Baumbach Co. v. Laube,* 99 Wis. 171, 74 N. W. 96; *Charles v. Godfrey,* 125 Wis. 594, 104 N. W. 814. Had the statute simply declared that the action to foreclose a lien should be deemed equitable, there could be no claim but that an equitable procedure would apply and control in all respects. There is nothing in the provisions modifying the procedure in such action which is inconsistent with the procedure in equity cases in other respects. The statutory regulation of the remedy goes no farther than to modify or confirm the rules that equity employs in similar suits and in no way abrogates their application to the varying exigencies that may arise in lien actions. From this it necessarily follows that the rights of the parties in such actions are to be enforced according to equitable remedies and the provisions of the statutes for determining the ultimate rights of the parties who have filed claims for liens against the property, whether they are plaintiffs or defendants in the action.

3. We now approach the specific grounds of demurrer. The complaint and the cross-complaints of the lienors allege in substance and form that they are subcontractors, that the principal contractors have failed to pay them in the amounts stated for materials furnished and labor performed under the construction contracts, and that they claim liens on the hotel property for these amounts and that the bondsmen are liable;

and they ask that the rights of all persons who have filed claims for liens on the premises, whether plaintiff or defendant, be ascertained, that the premises subject to the liens be sold to satisfy the liens, with costs, and, in case of deficiency, that they have personal judgment against the parties liable on the demands for which liens are claimed. The hotel company in its cross-complaint alleges the making of the construction contracts, and the bonds to secure performance thereof, the terms and conditions of these agreements, the failure of performance and that large sums are due the lienors, and that it has large claims against the principal contractors and their sureties for work done and material furnished in carrying the construction of the hotel to completion as called for by the construction contracts, and that it has a claim for damages against them for their default in not providing the material and completing the work as specified in the construction contracts. The sureties and the principal contractors contend, under their demurrers to the complaint and to the cross-complaints of the lienors and of the hotel company, that there is a defect of parties plaintiff and defendant, that several causes of action have been improperly united, and that the complaint and the cross-complaints do not state facts sufficient to constitute a cause of action.

It is provided in sec. 3321, Stats. (1898), that any such lienor may foreclose his lien by action and that all such lienors may join as plaintiffs, and if any of them do not so join, or refuse, they may be made defendants; also, that all persons having a subsequent mortgage, judgment, or other lien, and all subsequent purchasers of the premises, may be made defendants, and, if the action is brought by a subcontractor, then the principal contractor may be made a defendant. These provisions embrace all the persons who are parties of record in this suit except the sureties. The question is whether they are properly before the court as parties to the action. The relations of the sureties to the principal contractors, the sub-

contractors, and the hotel company, under the terms of the construction contracts and the bonds, have heretofore been considered, and they were held liable on their bonds to the hotel company and the lienors for any claims for material and labor needed to complete the construction of the hotel pursuant to the construction contracts on account of the principal contractors' default, hence they are vitally and adversely interested in the claims presented by the pleadings in favor of the hotel company and the lienors. Under their bonds they are primarily liable for payment of the debts and the liens for material and work. Under the equitable rule declared by sec. 2603, Stats. (1898), "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." Since the bondsmen have an interest in the controversy adverse to the plaintiffs, they are interested in not being subjected to any liability for claims of the lienors in excess of what may be found justly due them, and they are necessary parties to the litigation to determine this liability on doubtful claims should any such be presented for allowance. The sureties being thus adversely interested in the questions litigated, it is appropriate for a court of equity, in order to make a complete determination of all the questions involved between the parties, to require their presence so as to enable it to award judgment against them for the payment and discharge of all claims and liens according to the rights established in the action, thus saving the hotel company harmless in the matter. The court having jurisdiction of the parties, no obstacle exists to the granting of the relief demanded in the complaint and the cross-complaints, if it be so related to the subject of the action as to bring it within equitable cognizance. The primary right sought to be enforced in this action is to subject the property of the hotel company to the payment of the

lienors' claims accruing for the improvement of this property. The enforcement thereof necessarily involves the establishment and determination of the amount of the claims justly due from the principal contractors for the construction of the hotel, the enforcement of the liens therefor, and the payment of the debts. The liability of the sureties to pay them is therefore a subject germane to the primary purpose and object of the action. This liability is properly enforceable between all parties appearing as codefendants, under the provisions of sec. 2656*a*, Stats. (1898), which declares:

"A defendant . . . may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, . . . upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action."

The relief here sought against the sureties and their principals manifestly is related to and connected with the cause of action of the complaint and the cross-complaints of the lienors, and hence it includes and affects "the contract, transaction or property which is the subject matter of the action." Under the circumstances shown and under the provisions of the statutes, it is apparent that those who were made defendants in the action were properly before the court and that there was no misjoinder or defect of parties to the action.

The claim that the principal contractors, Martin & Wigman, and their obligor have no interest in the liabilities arising out of the contract and the bond of the *Kirkman Construction Company* and its obligor is not tenable, because the demands of all the parties are connected with and relate to the subject of enforcing liens against the premises of the hotel company and of obtaining the payment of the debts, or, as declared in sec. 2656*a*, Stats. (1898), they involve and affect "the contract, transaction or property which is the sub-

ject matter of the action." In the case of *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922, this court states:

"In an equitable action many matters are often adjudicated which would form the subject of an independent action, either at the suit of plaintiff against one or more of the defendants, or between different defendants, yet are properly brought before the court as germane to the subject of the action stated in the complaint."

See, also, *Carpenter v. Christianson*, 120 Wis. 558, 98 N. W. 517; *Level L. Co. v. Sivyer*, 112 Wis. 442, 88 N. W. 317; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909.

4. It is strenuously asserted in behalf of all the demurrants that several alleged causes of action have been improperly united and that the complaint and cross-complaints do not state facts sufficient to constitute a cause of action. The joinder of different causes of action for relief in favor of a party to a lien suit, or in favor of different persons who are proper parties to the action, is justified and proper, as we have heretofore seen, if the relief sought involves, or in some manner affects, "the contract, transaction or property which is the subject matter of the action." The grounds upon which the subcontractors, the hotel company, the principal contractors, and their bondsmen are found to be proper parties to this action for foreclosure of liens on the hotel property show that the relief they seek to enforce involves rights related and germane to the matter of enforcing the liens against the hotel property and securing payment of the amounts due under the construction contracts, and involves the determination of the ultimate liabilities of the parties between themselves, on each side of the controversy, pertaining to the transaction of the construction of the hotel. Jurisdiction of the parties in the suit for these purposes carries with it the right to unite in the complaint or cross-complaints the different grounds or causes of action for relief, to enable the court to "determine the ultimate rights of the parties on each side, as

between themselves, either on cross-complaint or equivalent pleadings or otherwise, and may grant to the defendant any affirmative relief to which he may be entitled." Sec. 2883, Stats. (1898). The scope of this power is declaratory of the broad, equitable powers courts may employ in joining parties and subjects in one suit, to determine their ultimate rights within its jurisdiction. This power is of peculiar applicability to lien foreclosure suits under the statutory provisions heretofore referred to and considered. The appellants claim and insist, however, that the causes of action alleged by the lienors against the principal contractors and their bondsmen for relief on the bonds, and by the hotel company against the *Kirkman Construction Company* and its surety for relief under the construction contract and the bond, are actions at law which cannot be litigated in this equity suit. A portion of the relief demanded by the hotel company is that, if the principal contractor default in paying what is due subcontractors for material and labor, then that the surety be required to pay such claims to save the hotel company harmless from liens against its property. This the surety contracted to do, and under this obligation the hotel company may enforce this primary liability of the surety to pay the debts of its principal. This right is within the equitable principle governing this duty between the surety and the hotel company, which in turn is liable to these lienors as a surety of the surety company, that the surety company bear the obligation which is about to be cast on the hotel company, which principle was applied in the case of *Dobie v. Fidelity & C. Co.* 95 Wis. 540, 70 N. W. 482, and approved in *Momsen v. Noyes,* 105 Wis. 565, 81 N. W. 860. The trial court held that the hotel company's claim for breach of contract by the *Kirkman Construction Company* was not related to the primary right sought to be enforced in this lien action. Failure of the construction company to furnish the material and do the work required of it has, it is alleged, resulted in damages to the

hotel company and in liens against its property. The rights and liabilities arising from the construction and surety contracts, the hotel property, the question of the hotel company's claim for unpaid lien debts, and its claims for damages for breach of the construction contract, which claims the company may retain and offset against any claim of the principal contractor or affirmatively enforce against the surety if the principal defaults in paying them, connect these inquiries sufficiently with the subject of the litigation to empower a court of equity to adjust and settle them between the parties to this action. The trial and determination of these issues in this action are incidental to the enforcement of the rights of the lien claimants against the hotel property, which the owners have a right to protect by asking that all the liabilities of the parties be adjusted and that no more be allowed to lien claimants than they are upon investigation entitled to, and that the principal contractor and his surety be compelled to pay such debts and save the hotel property harmless. The bond is involved in the suit and the relief therein as to lienors, and as to the hotel company for default in construction, and this sufficiently connects the hotel company's claim for damages for breach of the construction contract with the subject of the action to authorize the court to retain it in order to have a complete and final determination of the rights and liabilities of all the parties in any manner interested in these contracts and the property. We are persuaded that this holding is within the principle of the decision in the following cases, which hold that a court may "lay hold of a subject matter, however large, made up of a single primary right, and all rights germane thereto, however numerous, or several such subject matters under certain circumstances, bring all parties directly interested before the court, with all parties necessary to be there for their due protection, and settle the entire controversy by a single decree:" *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Gager v. Marsden,* 101 Wis. 598,

77 N. W. 922; *Carpenter v. Christianson*, 120 Wis. 558, 98 N. W. 517; *Herman v. Felthousen*, 114 Wis. 423, 90 N. W. 432; *Adkins v. Loucks*, 107 Wis. 587, 83 N. W. 934; *Level L. Co. v. Sivyer*, 112 Wis. 442, 88 N. W. 317; *Zinc C. Co. v. First Nat. Bank*, 103 Wis. 125, 79 N. W. 229; *St. Croix T. Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049.

The claim that this course deprives the demurrants of the right to have these issues tried by a jury is not sustained. Under sec. 2843, Stats. (1898), actions for the recovery of money only, or of specific real or personal property, or for divorce on the ground of adultery must be tried by a jury. No such case is here presented. The court properly overruled the demurrers interposed by the defendants.

By the Court.—The orders appealed from are affirmed.

STATE EX REL. HAYDEN, Respondent, vs. ARNOLD, Tax Commissioner, Appellant.

October 8—October 29, 1912.

Officers: Unlawful removal: Remedies: Mandamus: De facto *officers: Statutes: Repeal by implication: Construction: City civil service law: Head of principal department: Tax commissioner: Removal of subordinates: Assessors.*

1. *Mandamus* is a proper remedy where a person has been unlawfully removed from office, regardless of the place having been filled before commencement of the proceedings.
2. The *mandamus* remedy, in exceptional cases, may or may not be used, in the discretion of the court. There is no absolute rule as to use of such remedy to obtain possession of an office, except, it is not proper in case of a claimant having no *prima facie* title against one in possession holding by right, at least *de facto*.
3. In harmony with the liberal spirit of the Code, the use of *mandamus*, in general, should be favored where permissible at all, as the most expeditious mode of vindicating the right.

4. Repeals of written law by implication are not favored; therefore, if two legislative enactments, in terms, seem to conflict, they should be reconciled if practicable, and, if not, the earlier should give way to the later, in harmony with the presumed legislative intent.
5. All rules for statutory construction are subservient to the one that the legislative intention must prevail if it can reasonably be discovered expressed in the language used for that purpose.
6. By the civil service law (ch. 313, Laws of 1895), the manifest general intent was to place all municipal officers, in the cities referred to, except such officers as are specially excepted, under the merit system, both as to appointment and retention.
7. Where the general intention in the passage of a law, is plain, the enactment, in case of uncertainty, should be liberally construed to effect such intent.
8. In case of obscurity in a legislative enactment, the general understanding by all administrative officers having to do with applying it, which has subsisted for a long term of years, is strong, and in some cases conclusive, evidence of the true meaning.
9. The civil service law (ch. 313, Laws of 1895),—by necessary implication from its terms, by its manifest general purpose, and by such long understanding as to become, in practical effect, a part of it,—superseded all city charter provisions relating to the appointment and removal of assessors, inconsistent therewith.
10. Under such civil service law, the tax commissioner in the city of Milwaukee, is the head of a principal department, having power to appoint the ward assessors as his subordinates and the power to remove them, anything in the city charter, existing at the date of the enactment, to the contrary notwithstanding.
11. A person who has been, under the forms of law, dispossessed of an office to which he, at best, had only a *de facto* right, is not entitled to regain possession by *mandamus*.
12. The rule giving *de facto* dignity to the occupant of an office, is for the protection of the public; not to furnish him a weapon with which to regain possession. Being possessed thereof, he can defend against one who attempts to intrude thereinto; but cannot rely upon his *de facto* character to gain or regain that to which he has no right, in fact.
13. The power of appointing and removing subordinate officers having been conferred upon their superior, and procedure provided for executing such power and for use of a removed officer, in case of his deeming himself aggrieved, such procedure is exclusive in case such superior, in good faith, acts within the law.

[Syllabus by Marshall, J.]

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Mandamus to compel the tax commissioner of the city of Milwaukee to recognize the relator as assessor of the Third ward of such city and to fully reinstate him in such position. The following appeared by the petition:

For some time prior to January 31, 1912, the relator was assessor of the Third ward of the city of Milwaukee, duly appointed and qualified as such under the civil service law and rules. In the meantime the boundaries of such ward were, by a municipal ordinance under authority of ch. 436, Laws of 1901, changed so as to locate two assessors therein. On such date the tax commissioner of the city, pretending to act under power vested in him by the civil service law, notified relator of the change of ward boundaries, with the result stated, while only one assessor could legally perform the duties of the office, and that by reason thereof such relator was "removed and discharged" from his position. Since such time such commissioner, as president of the board of assessors of such city, has declined to recognize the relator as assessor of such ward or a member of the board of assessors, or permit him to perform the duties of such office. The ordinance changing the ward boundaries was not published till July 3, 1911. By ch. 497, Laws of 1911, published July 3, 1911, and by its terms to take effect from and after its passage and publication, the law under which the ward boundaries were attempted to be changed was repealed. Further facts were stated to show that the ordinance was void because of failure to comply with the law in attempting to make the change of ward boundaries. An alternative writ of *mandamus* was issued, motion made to quash the same, and denial thereof. This appeal is from the order accordingly entered.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, and oral argument by *Mr. Canright.*

For the respondent there was a brief by *Miller, Mack &*

Fairchild, and oral argument by *George P. Miller* and *J. G. Hardgrove.*

Marshall, J. Is *mandamus* a proper remedy to restore a person to an office from which he has been unlawfully removed?

In examining authorities bearing on the proposition stated, at least, the following situations should be observed:

(1) In general, where a person has been ousted from office, unlawfully, as he claims;

(2) Where a person was ousted and an action for possession commenced and brought to trial before the vacancy, thus in form created, was refilled;

(3) Where the circumstances exist as in No. 2, except the vacancy was filled after commencement of the action;

(4) Where a person seeks original possession of an office against the one holding the same by right, *de facto,* the outside claimant having no *prima facie* title;

(5) Where a person, having *prima facie* evidence of title, seeks possession of an office against one therein holding the same in defiance of such *prima facie* title and without color of right himself, other than such as mere possession might indicate and afford.

Failure to note these differences, it is thought, has led to some apparent conflict in decisions.

In some cases, involving the right of a person claimed to have been unlawfully ousted from an office to use the *mandamus* remedy to repossess himself thereof, the subject will be found treated in a broad general way as if such remedy were proper in all such cases, as for example, *State ex rel. Gill v. Watertown,* 9 Wis. 254. This court there, speaking by Mr. Justice Paine, said:

"It cannot be necessary to examine authorities to show that a *mandamus* is a proper remedy to restore a party to the possession of an office from which he has been illegally removed.

If citations were necessary, the following list would seem to place the question beyond discussion," giving a large number of illustrations.

An examination of them at this time is not satisfying that the broad general declaration was grounded on adjudications referred to; but was based on several standard elementary works, which support it so fully, it seems evident the court did not think there should be any fine distinctions between the different situations which may be characterized by an unlawful ouster from office. That would not militate against the propriety of a trial court exercising some measure of discretion as to whether to allow such remedy or not and deny it in case of the office being occupied at the time of suing out the writ and the real right of the matter being better triable by *quo warranto,* which could not often be the case, since the court might make the incumbent a party to a *mandamus* proceeding, if not so made at the start. The mere form of remedy is not of controlling consequence under the Code. Whether the particular remedy is appropriate to the case is the main thing,—not whether it is the sole remedy, but, is it a proper one because it is appropriate to the end sought.

This court has held that, under some circumstances, a person, who has never been in possession of an office claimed by him, may use the *mandamus* remedy to gain it of an adverse claimant. *State ex rel. Jones v. Oates,* 86 Wis. 634, 57 N. W. 296; *State ex rel. McCoale v. Kersten,* 118 Wis. 287, 95 N. W. 120. In *Board of Ed. v. State ex rel. Reed,* 100 Wis. 455, 76 N. W. 351, after deciding the case upon other grounds, and apparently without any claim of the sort having been made by the prevailing party, it was said, substantially, that where a person has been wrongfully ousted from an office he cannot wait for redress till the place is filled again and then use the remedy by *mandamus* to regain possession,—not citing the early case in this state, which did not recognize any exception, nor any other Wisconsin decision. The for-

eign authorities cited, upon examination at this time, are not satisfactory, from an original standpoint, and certainly not in view of the early case here. The only one which treats of the subject so as to challenge attention, is *People ex rel. Wren v. Goetting,* 133 N. Y. 569, 30 N. E. 968, and that only goes to the length of holding that, where the office has been filled and the right to regain possession turns on some difficult question of statutory construction, the trial court, exercising the measure of discretion which it might, properly, in such a case, may deny the *mandamus* remedy.

In other jurisdictions *mandamus,* regardless of whether intricate questions are involved, has been said to be the more appropriate remedy for a wrongfully ousted officer to use for repossession. As for example, *Lewis v. Whittle,* 77 Va. 415. There the court said:

"Wherever there is a right to execute an office, perform a service, or exercise a franchise, more especially if it is a matter of public concern, and a person is dispossessed of such right and has no other specific adequate remedy, then the court ought to assist by *mandamus* upon reasons of justice, as expressed by the writ, and upon reasons of public policy, to preserve the peace, good order and good government. . . . Whatever may be the rule elsewhere, it may be safely laid down as the doctrine of this court that *mandamus* is the true specific remedy for a wrongful deprivation of an office."

Continuing, in effect, where a person has been wrongfully ousted from his office and another installed therein the former is entitled to an adequate remedy for redress. The public is likewise interested and, in such circumstances, a remedy which merely decides the right but does not restore possession is not an adequate remedy:

"If, as suggested, *quo warranto* should be adopted, and the petitioners should succeed there, they would not thereby be put in possession of what they seek, but might still be put to the necessity of *mandamus* for relief. They might succeed

by *quo warranto* in removing their adversaries from the office, and yet need the *mandamus* to put them in possession."

A full and adequate remedy is needed to cover both and the party should have the benefit of it if he asks for it.

Many other authorities might be cited to the same effect as the foregoing. We will refer to but a few. In *Ex parte Wiley,* 54 Ala. 226, the court remarked:

"While the current of authority does not recognize *mandamus* as an appropriate remedy to test a disputed title to a public office, or in the first instance to compel the admission of a claimant, yet if the rightful officer, in the actual enjoyment of the office, is wrongfully removed, it is generally regarded as the proper remedy to compel his restoration."

In High on Extraordinary Legal Remedies (3d ed.) at sec. 67, no exception is recognized to the propriety of the use of *mandamus* to restore to office a person who has wrongfully been removed therefrom. Much authority is cited to support that view, and among them, one holding that the court should not thus interfere in case of an incumbency being *de facto.* That, the annotator remarked, is contrary to the current of authority.

It seems that the rule as here broadly stated in *State ex rel. Gill v. Watertown,* 9 Wis. 254, 258, has not been intentionally disturbed and that the practice should be regarded as settled accordingly; eliminating anything said in *Board of Ed. v. State ex rel. Reed,* 100 Wis. 455, 76 N. W. 351, to the contrary. The remedy by *mandamus,* as has been said, is the "right arm of the court." There should be freedom to use it whenever speedy justice and adequate redress seem to demand it, and when the public, in great measure, is interested, the court should be quite liberal in allowing such use. There should be no arbitrary rule of denial, except in case of occupancy of an office by one holding *de facto* against another claiming title thereto, but never having been in possession, or

regularly declared to be entitled thereto,—a case involving a square dispute as to the title between one claiming the right, though holding no *prima facie* title, as for example a certificate of election duly issued, and one in possession holding *de facto.*

It has seemed best to treat the subject of the *mandamus* remedy thus broadly, though the case might be rested on the narrow ground that no one was adversely in possession when the action was commenced, hence there was no one against whom *quo warranto* would lie, leaving *mandamus,* clearly, the only remedy for relator. However, if there would be any great impropriety in allowing such remedy in case of the office having been filled before commencement of the action, because of its involving the title as between the two, it would seem that much impropriety existed in the circumstances of this case at the time of the trial, since the right to the office between adverse claimants was involved just the same, and without the incumbent being before the court.

No good reason appears why the liberal spirit of the Code should not be extended to *mandamus* actions so as to enable any one unlawfully ousted of his office to use the strong "right arm of the court" for his speedy restoration. That broad rule will, if well understood, prevent much vexation of courts, delay of justice, and expense to litigants and the public by efforts in trial and appellate jurisdictions for recognition of exceptions having no substantial basis to rest upon and not contemplated when this court first dealt with the matter.

In so far as approval of respondent's claim for relief upon the facts appearing in the petition for the writ, is dependable upon whether the ordinance redistricting the city of Milwaukee into wards is invalid and, so, the cause for removal of relator did not exist, it must be resolved in favor of appellant, following *State ex rel. Neacy v. Milwaukee,* 150 Wis. 616, 138 N. W. 76, where the court held such ordinance to be valid.

Did the civil service law,—ch. 313 of the Laws of 1895, as

amended, particularly, by ch. 547, Laws of 1911,—confer the power exercised in removing the relator? The plan thereof is that, in general, positions and employments in the several principal departments of the civil service of a city shall be made by the respective heads of such departments, under rules established in a manner specified. The general scope is found in sec. 4 of the act and the exceptions in sec. 6. Among them is named "heads of any principal department." It is not contended that assessors are within the general class unless as subordinate officers under the tax commissioner as "head of a principal department," within the meaning of sec. 6. So it cannot be well claimed that they are specifically excepted out of such general class unless they are "heads of principal departments" instead of being subordinates under the tax commissioner.

The civil service law, in the beginning (Laws of 1895, ch. 313, sec. 4), provided that

"heads of departments shall respectively have power to remove or discharge at pleasure any person holding any subordinate office, position or employment in their respective departments;"

and the act of 1911 added:

"for cause which shall not be religious or political and shall be set forth in detail in writing and be filed within ten days with the secretary of the city service commission. But any such discharged subordinate shall be given an opportunity to make answer and his answer, when made in writing, shall be filed with the secretary of the commission."

At this point it is well to take note of the slight difference in phraseology between "heads of departments" mentioned in sec. 4 as having the power of appointment and removal and "heads of any principal department" mentioned in sec. 6 as being exempt from the civil service rules. It seems too clear to admit of fair doubt that the two terms are used synonymously. Therefore every head of a department having the

power of appointment and removal is the "head of a principal department" and is, as such, exempt from the exercise of such power by a superior.

Counsel for the relator contend that the power of removal by the tax commissioner did not exist under sec. 4, because the power of appointment was not thereby vested in him; that the city charter of Milwaukee—ch. XVIII, sec. 6 (Laws of 1885, ch. 391, sec. 3),—from before the passage of the civil service law, has provided that

"The mayor, with the concurrence of the common council, shall, on the first Monday of January in every second year, appoint an assessor for each ward in said city of Milwaukee, whose term of office shall commence on the first day of February following, who shall have been recommended to him by the tax commissioner, and who shall be a resident of the ward for which he is appointed, at the time of his appointment, and who shall continue to reside in such ward during the term for which said appointment is made:"

that such provision was not superseded by the civil service law.

It must be conceded that, if the contention as regards undisturbed integrity of the charter be sound, then the tax commissioner did not possess the power of removal when he pretended to exercise it.

The general scope of the civil service law is declared, plainly, in its title thus: "An act to regulate the civil service of cities." By the first section it was restricted to cities of the first and second class. So the design was to regulate such service in the city of Milwaukee. In general language it, manifestly, vested in the "head of each principal department" the power to appoint all his subordinates. If the assessors were such they, obviously, were not, at the same time, "heads of principal departments" and excepted from full operation of the civil service law by the terms of sec. 6.

There was no express amendment, by the civil service law,

of the city charter respecting the power of appointment of assessors. Was there an implied amendment, by lodging such power in the tax commissioner, or an express repeal of such charter provision and substitution of the civil service plan therefor, in that the two are in irreconcilable conflict and the civil service act contains a repealing clause as to "all acts and parts of acts conflicting with the provisions hereof are hereby repealed"?

It is elementary that repeals and changes of existing laws by implication are not favored. Therefore, if a later law, in its terms, conflicts with an earlier enactment, and the former will admit of a reasonable construction leaving the latter in force, that is to be adopted. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 129 N. W. 623. When it is thus said, it is supposed to harmonize with that other elementary and dominating rule, that the purpose of construction is to give effect to the legislative intent so far as that can reasonably be read out of the language used to express it. Therefore, though words may, looking only thereat, admit of a reasonable construction, working harmony between two enactments, if such construction will clearly violate the legislative purpose, it is not adoptable under the first rule, but must be rejected under the second. So when an act, by the fair import of its terms, looking thereto alone, conflicts with a former act, a variation therefrom by construction, within the scope of the language used, which would be permissible to effect a plain legislative purpose, cannot be resorted to where the effect would be to defeat it.

It follows, assuming for now, that there is ambiguity as to whether the assessors in the city of Milwaukee are subordinates in a department headed by the tax commissioner, that the general purpose of the civil service law, if that can be plainly seen, is important.

Without stopping to discuss at any great extent, the sub-

ject suggested, it may be safely said that, by the civil service act, the legislature intended to go as far as practicable in placing all administrative officers, below those elected by the people, in the cities dealt with, under the merit system. At that time the desirability of such a system was uppermost in the public mind, as a means of removing the mischiefs believed to exist in municipal administration. The evils to be remedied, the objects to be attained, and the general spirit of the enactment, show a studied effort to give the broadest effect thereto practicable. First there is the general reference to the entire civil service of the city. Then the section intended to place all officers thereunder except those specifically excepted in a subsequent section. That the term "subordinate officers," used at this point, was intended to include all except those specially excepted, making two classes, one mentioned in sec. 4 to be under the civil service rules and one mentioned in sec. 6 to be excepted therefrom, is put beyond all room for question by the intervening section, 5, providing that all applicants for offices in the civil service, except those mentioned in sec. 6, shall submit to the civil service rules. Sec. 6 completes the scheme by excepting certain principal officers, not including in the descriptive words, as before indicated, assessors, unless they were intended to be so by the words "heads of any principal department."

The plain purpose of the civil service law, being as indicated, in case of any uncertainty as to what intended meaning can be read therefrom, either in respect to particular words, terms, or clauses, they should be read rather favorable to the end sought to be attained, than unfavorable thereto so as to restrict the scope thereof, where there may be, reasonably, two views. In case of the purpose of a law being very manifest and construction being required to determine the expressed meaning, the import of words and clauses should be bent, so far as can be, reasonably, to effect such purpose. *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063.

In the foregoing it has been assumed in favor of the appellant that there is obscurity in the civil service law as to whether it was intended thereby to supersede the charter provision as regards the manner of appointing assessors and as to whether they are "heads of principal departments," and shows, it seems, that the first must be resolved in favor of appellant,—that is that the legislative purpose was to change the manner of selecting assessors if they were spoken of as subordinates. In that case a change in the charter provision must have been in the legislative mind, since the power of appointment of subordinates was unquestionably conferred upon "heads of principal departments." In such circumstances the two provisions cannot stand together and the early law must give way to the later, in harmony with the presumed legislative purpose.

Were the assessors treated as subordinates? If so, the tax commissioner was treated as the head of a principal department. It would seem that, if practical construction could ever be controlling, it should be regarded decisive in favor of the affirmative of that question. It is the established doctrine of this court that "uninterrupted practice of a government prevailing through a long series of years and the acquiescence of all departments, legislative, executive, and judicial, sometimes becomes decisive even on constitutional questions." *Dean v. Borchsenius,* 30 Wis. 236.

"The general understanding of a law and constant practice under it for so long a period by all the officers of government whose duty it has been to execute it, unquestioned by any suit brought or public or private action instituted to test or settle the construction in the courts, ought to be very strong, if not conclusive, evidence of its true meaning and application, and that they are such as it has thus received." *Scanlan v. Childs,* 33 Wis. 663, 666.

For some sixteen years prior to the commencement of this litigation, the Milwaukee charter provision respecting the selection of assessors has been supposed, by all concerned, to

have been superseded by the civil service law. That has been "the general understanding and constant practice under it . . . by all the officers of government whose duty it has been to execute it." It has been submitted to, unquestionably, by every one. The relator accepted office under it. He was appointed by the tax commissioner, according to his petition, thirteen years before the happening of the incident of which he complains. He held office during that long period under such appointment which, if valid, was subject to recall at the pleasure of the person making it. Not even was it necessary, as we have seen, prior to the amendment in 1911, for the appointing officer to assign any cause for exercising the power of recall. During all that time the tax commissioner, by general consent, has been regarded as head of a principal department under the civil service law.

Now, it is true that, if there be no reasonable ground in the civil service act for the notion that the tax commissioner is the "head of a principal department" having the assessors, his appointees, as subordinates, practical construction cannot put such meaning into it. Such construction sometimes is the most conclusive means of getting the real legislative purpose out of a law, but cannot be resorted to for the purpose of changing it, any more than any other rule of construction can be so used.

Turning now to the scope of the tax commissioner's duties, it is easily seen that there is a very legitimate basis for the meaning the administrators of the civil service law started with. Those who had to do with the enactment appreciated, probably, better than we can at this time, the evils it was intended to remedy and the required status of the tax commissioner in the general scheme respecting assessors.

The features of the Milwaukee city charter giving rise to the thought that the legislature regarded the tax commissioner as the head of a principal department, are these: One of the major subjects dealt with in the charter is that of as-

sessment and collection of taxes, ch. XVIII being specially devoted thereto. The first office therein created is that of tax commissioner. A means of filling it was specified, and the place was clothed with much dignity. A term of three years was fixed and the selection was left to the mayor, subject to confirmation by the council. The one chosen was required to file an official oath and give a large bond to secure faithful performance of his official duties. He was given power to appoint a deputy tax commissioner and provided with clerks and an office and required to keep important records,—in fact all records appertaining to the subject of assessment of property for taxation. All complaints as to mistakes, and injustice otherwise, in the administration by the assessors, were required to be filed in his office to be disposed of by the board of assessors presided over by him. Power was given to the common council to provide for assistants to the assessors to be appointed in the same manner as the regular assessors and to "enter upon their duties under the direction of the tax commissioner." In case of an assistant assessor for any ward, the tax commissioner was required to "designate the property and territory to be assessed by each." He was given "power, with the written approval of the mayor, to remove from office any assessor" for incompetency in his opinion or neglect to perform the duties of his office. All assessors were required to report their work to him and he was required to furnish to them specified information to aid in the performance of their duties. Upon receiving the completed tax rolls from the assessors, the commissioner was required to give notice of the times and places where they would be open for examination. There are other features of a persuasive character found in the charter, ch. 184, Laws of 1874, ch. 144, Laws of 1875, and ch. 391, Laws of 1885 (Compiled Charter of 1905). Moreover, by ch. 401, Laws of 1907, there is unmistakable recognition of the tax commissioner being head of a principal department. The whole framework thereof so in-

dicates. He is there clothed with power to create from the assessors a board of five appraisers with extraordinary duties; also power to divide the city into assessment districts without regard to ward lines and do, or have done under his immediate supervision, much of the work ordinarily done by assessors; to assign to each assessor his particular task and they are required "to proceed under the supervision and direction of said tax commissioner" to perform their duties. The completed tax rolls are treated as made under the control of the tax commissioner. The work of the assessors is confined, in the main, to merely exercising their discretion as to the assessable value of property. The ordinary requirement that an assessor shall verify his roll when completed and deposit it with the person required by law to make out the tax roll, is taken away and conferred upon the tax commissioner. He is required to make oath to all matters ordinarily covered by the assessor's oath,—to depose that "as far as practicable each parcel of real estate was valued by the assessor making such valuation from actual view of such parcel," etc.

Taking the features aforesaid in the aggregate, they seem to make a very strong case in favor of the view that, by necessary implication, the tax commissioner was intended to be dealt with as the head of a principal department,—that rules for construction are not required to clear up any obscurity in respect to the matter. In any event, the major and controlling probabilities are in favor of the idea that the legislature so considered at the start, and long acquiescence in such view should be regarded as decisive; moreover, the legislative recognition of such view after prevalence thereof for twelve years seems to leave no reasonable room for doubt as to the right of the matter.

The trial court reached the rather illogical conclusion, it seems, that the tax commissioner is the head of a principal department, within the meaning of the civil service law, but that the Milwaukee charter provision respecting the appoint-

ment of assessors was not disturbed thereby, because the assessors are themselves heads of departments,—not subordinates under the tax commissioner,—that they are not such since they are required to exercise their judgment in making the assessment without dictation from the tax commissioner,—and, therefore, relator is entitled to restoration though he was not legally appointed in the first place. The dominant feature of the law, the persuasiveness of the practical construction referred to, the manifest legislative recognition of the status of the tax commissioner and the inconsistency of *mandamusing* one into office who was never entitled thereto, must have been overlooked. If the logic of the circuit court's decision be sound, in that the power of appointment of assessors is not conferred upon the tax commissioner by the civil service law, then the result reached must be plainly wrong, as appellant's counsel claim, since, in any event, the relator has no more right to that which he seeks than a stranger. Why should the court restore a person to an office to which he was never legally appointed and in which he was little more, if anything, than a mere intruder, a person not appointed by any authority given power in that regard under any circumstances?

To be a *de facto* officer one must be in place under color of right. If the office is appointive, as said in the books, he must be in possession under authority having colorable power to make the appointment, *Kempster v. Milwaukee,* 97 Wis. 343, 72 N. W. 743; *Ex parte Strang,* 21 Ohio St. 610, 617; *Prescott v. Hayes,* 42 N. H. 56, 58; *Fitchburg R. Co. v. Grand Junction R. & D. Co.* 83 Mass. (1 Allen) 552, 557, though, probably, long acquiescence might make him an officer *de facto* upon the presumption of an appointment by lawful authority; *Auditor General v. Menominee Co.* 89 Mich. 552, 51 N. W. 483. But a person confessing himself, and found to be only, at best, an officer *de facto,* cannot have *mandamus* to obtain possession of the office. The doctrine throw-

ing a measure of protection around an officer *de facto* is for the protection of the public, not to afford such an officer any advantage in ousting some other person from the *de jure* office. *Adams v. Tator,* 42 Hun, 384, 386.

Thus counsel for appellant is logical in seeking to overturn the final conclusion below as inconsistent with the one respecting the legitimate source of an assessor's authority in a city of the first and second class, but concedes too much in assuming that the trial court's holding as to such source is sound. We confess the wisdom of counsel for respondent in rejecting the trial court's conclusion as regards the effect of the civil service law in changing the appointing power and attempt to sustain the judgment, nevertheless, upon the theory that the assessors are not subordinate officers under the tax commissioner; but, cannot agree with counsel on that, as we have indicated.

The trial court's idea that the contrary of the foregoing is supported by anything decided in *Johnson v. Milwaukee,* 147 Wis. 476, 133 N. W. 627, does not seem to be warranted. The reasoning in that case is in harmony with that here. Emphasis was given there to the words "principal department" and the fact that the law required the officers in question, as here, to perform their duties under the direction of the one held to be "head of a principal department." The idea was made prominent that there may be subordinate departments, each complete in itself, in the sense of having duties incident thereto to be performed in the discretion of the incumbent, and yet performance be under the direction of the head of a principal department of which each of the smaller ones is an integral part.

We see no escape from the conclusion that the tax commissioner of the city of Milwaukee is the head of a department contemplated by sec. 4 of the civil service law conferring power upon such to appoint subordinates and the companion power of removal, and that the assessors are subordinates

within the scope of such authority, as has been understood to be the case and must be, if relator has any standing whatever under any circumstances, as he refers to such source for his official status.

The point is made that the ground assigned for the removal of the relator did not constitute "cause" within the meaning of the civil service law. It is considered otherwise. The law did not contemplate there being two assessors in the same district. It, especially the act of 1907 (ch. 401), rather repels the idea of any such divided responsibility, or opportunity for clash of authority, or necessity for the tax commissioner to deal with such a situation to prevent a clash. A pretty plain case existed of necessity for recall of one of the assessors, since the new division of the city into wards left two of such officers in the particular ward, each claiming to be an assessor of such ward. However, whether the cause was a good one or whether it existed, was not a matter to be settled by a *mandamus* action, as said in *State ex rel. Bannen v. Arnold, post,* p. 38, 138 N. W. 85. The relator accepted office under the law which reserved the right to remove him for "cause," affording him opportunity to answer and raise the question of whether the assigned cause existed or not and whether it was a real cause within legislative contemplation. His remedy was under the act creating the system by favor of which he held office.

By the Court.—The order appealed from is reversed, and cause remanded with directions to dismiss the proceedings with costs.

STATE EX REL. BANNEN, Respondent, vs. ARNOLD, Tax Commissioner, Appellant.

October 8—October 29, 1912.

Officers: City civil service: Removal or discharge: Mistake as to cause: Remedies: **Mandamus.**

Where a head of a department has acted in good faith, under sec. 4, ch. 313, Laws of 1895, as amended by ch. 547, Laws of 1911, in the matter of the removal of a subordinate for cause, even though he may have been mistaken as to the existence of the cause assigned, the remedy given by said section by way of making answer and being heard in the matter is exclusive, and reinstatement will not be compelled by *mandamus* or other judicial proceeding.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

Mandamus to compel the tax commissioner of the city of Milwaukee to recognize the relator as assessor for the Sixteenth ward of such city and to fully reinstate him in such office from which he had been, in form, removed.

The proceedings were the same in this case and based on the same state of facts as in *State ex rel. Hayden v. Arnold, ante,* p. 19, 138 N. W. 78, except the change of ward boundaries, as stated in the petition, left the relator still a resident of the Sixteenth ward, for which he was appointed, with no other assessor residing therein, though the order of removal was grounded on the theory that the Fourth ward, as reorganized by the ordinance changing the ward boundaries, included the residence of the relator and that of another assessor.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Garfield S. Canright,* assistant city attorney, of counsel, and oral argument by *Mr. Canright.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *George P. Miller* and *J. G. Hardgrove.*

MARSHALL, J. This case, in the main, is ruled by the decision in *State ex rel. Hayden v. Arnold, ante,* p. 19, 138 N. W. 78, mentioned in the statement. The only difference as to facts is that, the cause assigned for removal did not exist. But we are constrained to hold that such circumstance cannot make any difference. Manifestly, the legislative purpose was that relief from any mistake of that sort should be sought by the specific means provided in the civil service law. The relator, in accepting office under it, submitted to its provisions, including those empowering the commissioner to remove him at pleasure, filing a statement of the reasons, to which, as indicated in the former case, the law gives opportunity to answer.

Sec. 4 of the civil service law (ch. 313, Laws of 1895), in the beginning, clothing the appointing power with power of removal or discharge at pleasure, does not suggest that such power is usable otherwise than within the boundaries of discretion and for legitimate purposes. The fact that the legislature saw fit by ch. 547, Laws of 1911, to amend such section by providing, specifically, that exercise of the power of removal must be for cause, not "religious or political" and "be set forth in detail in writing and be filed within ten days with the secretary of the city service commission," . . . "any such discharged subordinate" to "be given an opportunity to make answer and his answer, when made in writing," to be "filed with the secretary of the commission," suggests that the legislature contemplated such joining of issue, at the option of the discharged employee, to afford him a hearing of some sort before the administrative head respecting existence of the cause assigned and redress by reinstatement in case of its appearing to the responsible officer that he had misjudged the matter. It was competent for the legislature to give or not give this opportunity. In case of the latter, and a person accepting service under the law, he has no reason to complain. In case of the former, so long as the appointing

and removing officer acts within his jurisdiction, the remedy afforded is exclusive. That is according to elementary principles, therefore we will not emphasize it by citation of authority.

Applying the foregoing, in view of the fact, which satisfactorily appears, that the tax commissioner acted in the removal proceedings in the honest belief that the cause assigned for displacing relator existed, the latter's remedy, if such cause did not exist, was under the civil service law, not by ignoring it and appealing to the courts in a *mandamus* or other proceeding. If such were not the case, then, every time an appointing authority under the civil service law acts under the correlative power to discharge or remove, he would do so in peril of having to justify his action in judicial proceedings by showing satisfactorily to some court of general jurisdiction within his judicial district, that the cause assigned exists and is sufficient. Certainly the legislature did not contemplate any such thing. Nothing of the sort is suggested, expressly, in the language of the law. Nothing of the sort is suggested by it, inferentially. The legislative policy, evidenced by the enactment, is repellent to any such thing. To engraft upon it any such an incident by construction, would undermine the law by taking from it one of the most essential elements of the legislative plan, *i. e.* to give the appointing authority the largest practicable measure of discretionary power to act summarily, in all cases, respecting the incumbency of subordinate positions, with reasonable opportunity to correct mistakes upon the same being brought to attention in the manner specified; such course being supposed to be promotive of, if not actually necessary to, the best attainable performance of subordinate duties.

So, regardless of whether the assigned cause existed for the removal of the relator, his remedy was not that to which he resorted. The petition for the writ shows that the tax commissioner exercised the power of removal for cause, as the

facts appeared to him, and that the relator instead of following the course open to him for having the mistake, if there were one, corrected, commenced a hostile judicial proceeding. As well may a defeated litigant in a trial court which has rendered judgment on a mistaken notion of the facts, instead of following the proper remedy for redress, commence an action against the judge to compel him to correct his mistake. Obviously, a complaint in such circumstances, would state no cause of action for relief within the competency of a court to grant. The same is true in this case. So the motion to quash the alternative writ should have been granted and the proceedings dismissed.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to dismiss the proceedings with costs.

MONK, Respondent, vs. HURLBURT, Appellant.

October 8—October 29, 1912.

Pleading: Amendment: Parent and child: Stepfather: Liability for necessaries: Services of physician.

1. Amendment of the complaint to make it conform to the proof was properly allowed after verdict, where the questions embraced in such amendment were litigated on the trial and all of the facts were before the court.
2. A stepfather is liable for the value of medical and surgical services rendered to his stepson, to whom he stood in the position of parent, where a special exigency as to the boy's health existed, requiring the treatment, and the stepfather, knowing the boy's condition and that treatment was necessary and was being furnished, made no objection but so acted throughout as to show approval of what was being done.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

In February, 1910, John Murray, then seventeen years of

age, while attending school at Neillsville, became ill. The plaintiff, a practicing physician and surgeon at Neillsville, was called by Murray's roommate to treat him. In 1901 Murray's mother was divorced from his father. The decree of divorce gave the custody of the child to the mother and ordered the father to pay to her $5 per month during the minority of the child for his support. Murray's father has not made these payments. Five years before Murray became ill, the defendant, who is a farmer residing some miles from Neillsville, married Murray's mother. A couple of weeks after his mother's marriage to the defendant, Murray, then twelve years of age, came to the home of the defendant to live. At the time of her marriage to the defendant Murray's mother had between $300 and $400. She has since received about $100 from her father's estate. Murray was never legally adopted by the defendant.

On the day after Murray became ill he went to the home of a married sister in Neillsville, and while he was there he was treated by the plaintiff. Shortly after Murray became ill the defendant brought his mother to her daughter's home and she remained there to nurse him. Early in March, 1910, a necessary operation was performed on Murray. Another physician assisted the plaintiff in operating. Supplies and medicines for Murray were procured from a drug store and charged to the defendant. Several times during Murray's illness the defendant came from his farm to see him. During these visits he met the plaintiff, but did not direct him to care for Murray or to perform the operation; nor did he object to such treatment of Murray by the plaintiff. When Murray had recovered sufficiently so that his mother's attendance was no longer necessary, she returned to the farm, and when Murray was able he also went there. While he was at the farm the plaintiff called to treat him, and Murray called at the plaintiff's office for treatment. The plaintiff last treated Murray in the month of July, 1910.

The claim of the physician who assisted the plaintiff in the

operation on Murray and the claim for medicines and drugs have been assigned to the plaintiff, and he seeks to recover for them and for his own services on the ground that the defendant stood in the place of a parent to Murray and had occupied the position of a lawful parent to him, particularly with reference to supporting and maintaining him and supplying him with necessaries. The plaintiff kept his account in Murray's name. Some credits on the account were paid by Murray and others, but the defendant has made no payment on any of these accounts. Judgment was rendered in justice's court in plaintiff's favor and an appeal was taken by the defendant to the circuit court.

In addition to the facts above set out the evidence tends to show that the defendant advised with his wife concerning Murray and his education, that he kept no account of the cost of his board and lodging or of any of the articles furnished him, that he permitted him to remain upon the farm and to attend school, that when Murray attended high school at Neillsville he paid grocery bills contracted by him and charged to the defendant, and that he permitted Murray to retain and spend any moneys he earned during vacations. Later he paid Murray for work he did on the farm when he could have earned money elsewhere. The defendant testified that he never asserted or had control of Murray.

The jury returned a special verdict finding that the services and the medicines furnished Murray were necessaries, that the defendant, after Murray came to his home to live with him, treated him as a son, with reference to accepting his services and providing for his support and maintenance up to and including the time when the services were rendered by the plaintiff and the medicines were furnished, and that the plaintiff and the druggist had reasonable grounds for believing that the defendant stood in the position of a parent to Murray and had assumed the obligation of supporting him.

After the rendition of the verdict the court denied defendant's motion to change answers to the questions of the special

verdict, and allowed and permitted an amendment to the complaint alleging that, for more than two years before the services were rendered by the plaintiff and the medicines furnished, the defendant had stood in the place of a parent to Murray, that he had during that time furnished him with board, clothing, and schooling, that he had permitted Murray to obtain goods upon defendant's credit, that he had allowed Murray to make his home with him during school vacations and had accepted Murray's services without compensating him therefor and without keeping account of board, clothing, and other necessaries furnished him, that the rendition of the services and the furnishing of medicines to Murray were necessaries, that the defendant had notice within a few days of the rendering of the services and the furnishing of the medicines and had knowledge that the services were being rendered and the medicines furnished, that the defendant knew that the operation was to be performed, that the defendant furnished Murray with a horse to go from the farm to Neillsville to receive treatment from the plaintiff and to obtain medicines, and that the defendant had never objected to the services being rendered or the medicines furnished, and had not then denied liability therefor.

This is an appeal from the judgment on the verdict.

For the appellant there were briefs by *E. W. Crosby,* attorney, and *R. J. MacBride,* of counsel, and oral argument by *Mr. MacBride.*

S. M. Marsh, for the respondent.

Siebecker, J. The objection to the amendment of the complaint after verdict, upon the ground that it operated to defendant's injury, is not sustained. It appears that the parties litigated the questions embraced in this amendment at the trial, both before the justice and in the circuit court. By allowing the amendment the court did no more than to conform the pleadings to the proof, pursuant to the provisions

of sec. 2830, Stats. (1898). All the facts embraced in this pleading were before the court. Under such a state of the case the action of the court in no way injured the appellant, was promotive of justice, and is abundantly supported by the adjudications. See the following cases and those referred to therein: *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Kleimenhagen v. Dixon,* 122 Wis. 526, 100 N. W. 826; *Hopkins v. C., M. & St. P. R. Co.* 128 Wis. 403, 107 N. W. 330.

The contention is made that the facts and circumstances shown do not establish defendant's liability for the professional services plaintiff rendered for Murray, defendant's stepson. The facts of the case sufficiently appear in the foregoing statement and need not be repeated. The jury found that the defendant stood in the position of parent to his stepson, that plaintiff had reasonable grounds for believing that this relation existed, that the defendant had assumed the obligation of providing the boy with necessaries, and that a special exigency as to the boy's health existed requiring medical and surgical treatment. It is manifest that the defendant was fully apprised of the boy's sick condition, that he understood such treatment was necessary, that he knew it was being furnished by the plaintiff, that he interposed no objection thereto, and that he so acted throughout the period of the boy's illness as to show approval of plaintiff's course in rendering the services. Under this state of the facts the defendant's liability for the value of the services rendered by the plaintiff is fully established, within the principle that the law implies a promise where a parent, with full knowledge of the facts and without objection, allows and approves of his child being furnished with necessaries. We consider the instant case to be within the rule approved in *McGoon v. Irvin,* 1 Pin. 526, and *Zilley v. Dunwiddie,* 98 Wis. 428, 74 N. W. 126.

The claim that the court erred in not incorporating defendant's requested questions in the special verdict is not sup-

ported. The court practically adopted defendant's question relating to the existence of a special exigency for furnishing medical services. The verdict fully covers all the inquiries suggested by the rejected questions and embraces the litigated issues in the case.

We have examined the exceptions cited to our attention to rulings on evidence and to instructions given the jury. They are not of sufficient importance to require restatement here. No prejudicial error was committed as regards them.

By the Court.—The judgment appealed from is affirmed.

ELWELL, Respondent, vs. BOSSHARD, Appellant.

October 8—October 29, 1912.

Assault and battery: Damages: Appeal: Exceptions: Sufficiency.

1. **An award of $300 compensatory damages for an assault and battery is *held* to be sustained by the evidence, plaintiff having been attacked upon a public street and, besides injury to his feelings resulting from the indignity, his physical injuries being somewhat serious.**
2. **A general exception to the entire charge to the jury, much of which is concededly correct, is not available on appeal; nor is a general exception to the refusal to give requested instructions, some of which at least should not have been given.**

APPEAL from a judgment of the circuit court for Juneau county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Naylor & McCaul.*

Daniel H. Grady, for the respondent.

KERWIN, J. This is an appeal from a judgment for damages in an action for assault and battery. The jury returned a verdict for the plaintiff for $300 compensatory damages and awarded no punitory damages.

Error is assigned upon the charge to the jury, refusal to charge as requested, and because the damages are excessive. On the question of excessiveness of damages little need be said. There is evidence that the assault was committed on a public street and that the defendant struck plaintiff on the nose, chin, and cheek with his fist, and that shortly after plaintiff was struck he fainted; that he suffered severe pain in his left temple and left eye; that his cheek and mouth were cut; that his nose was cut and his false teeth broken and his gums severely injured. There is an abundance of evidence that defendant struck plaintiff repeatedly with considerable force. Moreover, the attack was made upon a public street and was witnessed by several persons, therefore injury to feelings resulting from the indignity and public exposure was properly to be considered by the jury. *Draper v. Baker,* 61 Wis. 450, 21 N. W. 527. There was also testimony of physicians as to seriousness of the injuries. It is wholly unnecessary to review the evidence. It is ample to support the verdict for the amount of damages awarded.

The errors assigned on the charge and refusal to charge cannot be reviewed for want of proper exceptions. The appellant filed a general exception to the entire charge. Much of the charge is concededly good and so admitted by appellant; therefore the exception was not sufficient. A general exception was also filed to the refusal to charge. Counsel for appellant made several distinct requests embraced in separate and distinct propositions, some of which, at least, should not have been given; therefore the general exception to refusal to charge as requested was not sufficient. *Kersten v. Weichman,* 135 Wis. 1, 114 N. W. 499; *Bouck v. Enos,* 61 Wis. 660, 21 N. W. 825; *Luedtke v. Jeffery,* 89 Wis. 136, 61 N. W. 292; *Sheppard v. Rosenkrans,* 109 Wis. 58, 85 N. W. 199.

By the Court.—The judgment of the court below is affirmed.

McMillan, Respondent, vs. Barber Asphalt Paving Company, Appellant.

October 8—October 29, 1912.

Municipal corporations: Public improvements: Bribery: Illegal contract: Injunction: Judgment, upon whom binding: Contractor taking part in defense though not a party: Performance of contract pending appeal: Right to compensation: Invalidity of improvement bond: Innocent purchaser: Equitable remedies: Reassessment.

1. Where, in an action to restrain a city from entering into a paving contract with a certain company because the latter had bought off the opposition of one of the aldermen, the company was not made a party, but its counsel, under a general retainer from it and at its expense, participated with the counsel for the city in the trial, defending in the name of the city but for the company, a judgment in favor of the plaintiff was binding upon the company as well as upon the city.
2. A preliminary injunction in such action was dissolved and defendant had judgment. Pending an appeal the contract was entered into and was fully performed by the paving company. The appeal resulted in a decision holding the contract illegal and in a final judgment for plaintiff enjoining its execution, relating back to the time when the action was begun. *Held*, that the paving company had performed the contract at its peril, and that the illegality thereof, established by said judgment, might thereafter be taken advantage of by the plaintiff in an action to annul a special improvement bond issued to the company against his property.
3. It appearing that the improvement bond had been sold to an innocent purchaser, so that the equitable remedy asked for could not be granted, judgment was properly rendered against the defendant paving company for the present worth of the bond.
4. As to the plaintiff, the paving company was a wrongdoer, placing improvements upon his property against his will, and had no equitable right to compensation.
5. The reassessment statute (sec. 1210*d*, Stats.) does not apply where, as here, the work has been done in the face of pending preventive litigation.
6. The illegality inherent in the paving contract continued and vitiated it notwithstanding the resignation of the erring alderman and the subsequent execution of the written evidence of the con-

tract by the remaining city officers. The relation of principal and agent did not exist between the city and the alderman so that the city could, by accepting the benefits of the corrupt contract, ratify it.

7. The facts that an alderman agreed to and did withdraw his opposition to the letting of a contract for a public improvement in consideration of a concession of pecuniary value made by the contractor to all persons, including such alderman, and that the alderman thereafter availed himself of such concession to his own private pecuniary advantage, are sufficient to avoid the contract.

8. Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the decree is made can be founded on an execution of that contract, unless the parties, before or after such execution, take such steps as are equivalent to the making of a new contract upon a new and lawful consideration.

9. Equity may in all cases so frame its decrees as to make them effective to do equity, and the forms of equitable relief are as various as the transactions investigated and regulated in equity.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Frank M. Hoyt, for the appellant.

H. E. Swett, for the respondent.

TIMLIN, J. In *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240, the city of Fond du Lac was enjoined from entering into the paving contract in question because the *Barber Asphalt Paving Company* had bought off the opposition of an alderman named Dockery to such contract by a concession to him and others of a reduction of $6 per thousand upon paving brick which that company was selling. When the former case was begun the contract was executory, a preliminary injunction restraining its execution was obtained, but vacated on motion of the city, and the circuit judge refused to continue it pending the appeal to this court. While that appeal was pending the contract in question was executed by the city and the paving company and the pavement therein provided for was laid. After the decision of this court on

March 9, 1909, although the contract had been then executed, judgment in the circuit court was entered enjoining the execution of that contract, thus relating back to the time of the commencement of that action and giving the plaintiff, *McMillan,* the benefit of his temporary injunction which the circuit court had wrongfully refused to continue pending the appeal. The present defendant was not a party to the former action, but its counsel appeared therein and participated in the defense in the circuit court and in this court. He was then under a general retainer from the defendant in this cause, he made no charge against the city, and this defendant paid his expenses. The city had other counsel, but the defendant's counsel, while defending in the name of the city and to some extent for the city, was also defending for the *Barber Asphalt Paving Company* in the name of the city. It could not have been otherwise. Under such circumstances the judgment in the former action was binding upon the defendant in this cause as well as upon the city of Fond du Lac. *Kolpack v. Kolpack,* 128 Wis. 169, 107 N. W. 457, and cases cited; *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1.

When the paving work was completed under the contract in question payment was made to the defendant in special improvement bonds pursuant to secs. 925—190, 925—192, 925—193, ch. 40*a,* Stats. (1898). A bond was issued against plaintiff's property. The plaintiff thereafter brought this action to cancel and annul this special improvement bond. It appeared on the trial that the bond had been sold by the defendant to an innocent purchaser, and judgment was rendered in favor of the plaintiff and against the defendant for the present worth of this bond, amounting to $1,214.58. This procedure was correct. *Luetzke v. Roberts,* 130 Wis. 97, 109 N. W. 949. Where a suit within the jurisdiction of equity is launched in good faith, and it thereafter appears that by reason of acts of the defendant or the intervention of the rights of innocent third parties the equitable remedy is due to the

plaintiff but impossible to be carried out, the courts may and frequently do decree money compensation in lieu of such other remedy. *Bigelow v. Washburn,* 98 Wis. 553, 74 N. W. 362; *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603.

The defendant also contends upon this appeal that notwithstanding the adjudication that the contract in question could not be legally entered into, yet the fact that such contract was, while the judgment of the court below sustaining it stood, not only entered into but fully performed, now operates to deprive the plaintiff of any benefit of the former judgment of this court. We cannot assent to this. The defendant, after it was informed by the commencement of the other action that its contract was tainted with illegality, went on and performed the same at its peril. It merely took its chances of the plaintiff making good his contentions and annulling the contract. Any other rule would permit the trustee and a third person, or a municipal corporation and a third person, to defeat the action of a *cestui que trust* or a taxpayer charging fraudulent collusion by merely continuing the collusion and completing the execution of the writing and performing the work upon the contract after the action to enjoin execution of the same was begun. *Chippewa B. Co. v. Durand, supra.* Courts are not so impotent; the law not so easily disregarded.

The illegality inherent in this contract continued and vitiated the contract notwithstanding the resignation of the erring alderman as a member of the city council and the execution of the written evidence of the contract after such resignation by the remaining city officers. This is not the case of a principal who, after being informed of the fact that his agent had been corruptly influenced by the person with whom he has made a contract on the principal's behalf, yet chooses to permit the contract to be performed and avail himself of the benefits to be derived therefrom. The relation of principal and agent did not exist between the erring alderman and the city.

A municipal corporation cannot condone in this way illegalities of this nature. The plaintiff is entitled to vindicate the rights recognized and established by the judgment in the action in which he prevailed. We find nothing in the conduct of the plaintiff which amounts to a waiver of his right to assert the illegality of the contract declared in *McMillan v. Fond du Lac,* 139 Wis. 367, 120 N. W. 240.

It is argued that the defendant in this cause, when it made the concession upon the price of brick to the erring alderman, did not know that the latter had a private pecuniary interest in obtaining that concession, but thought or might have thought he was acting for the general welfare in so doing. We consider that the defendant in this action is upon this point foreclosed by the decree in *McMillan v. Fond du Lac, supra,* on account of its participation in the defense of that action. But there are also other considerations. It can hardly avail to remove the taint of illegality from an offer to buy off opposition of a public officer to a contract by a reduction of price on a certain staple article of property to profess ignorance of how such reduction would benefit the officer. If this is enough to remove the taint of illegality, then a new, safe, and ingenious method of bribery has been discovered. It is enough to avoid the contract that the officer agreed to and did withdraw his opposition in consideration of concession of pecuniary value made to all, including himself, and that he availed himself of this concession to his own private pecuniary advantage. It is better that those dealing in municipal contracts were made aware that all their acts will be strictly scrutinized. As to the plaintiff, this paving contract between the defendant and the city, made in violation of a law founded upon public policy, is as if it never existed. As to the plaintiff the defendant was a wrongdoer, placing improvements on plaintiff's property against the will of the latter and in spite of opposition. Under such circumstances there is no rule of equity which recognizes the defendant's right to compensation. 3 Pom. Eq. Jur. (3d ed.) § 1241.

The point is made that the reassessment statutes should have been applied in this action. We do not think so. Sec. 1210*d*, Stats. (1898), as amended by chs. 9 and 19, Laws of 1901, ch. 276, Laws of 1903, and ch. 501, Laws of 1905, relates to cases where the work of paving, etc., has not been done in the face of pending preventive litigation. The present is a case where the work was done after the preventive suit was begun and while it was pending. It was not intended by that statute to take away from the courts the power to prevent the execution of an unlawful contract where the action was begun before the contract was consummated and the preventive jurisdiction of equity invoked. Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the decree is made can be founded on an execution of that contract, unless the parties before or after such execution take such steps as are equivalent to the making of a new contract upon a new and lawful consideration. *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603; *Cawker v. Central B. P. Co.* 140 Wis. 25, 121 N. W. 888. If a connection between the original illegal transaction and a new promise can be traced, no matter how many times and in how many different forms it may be renewed, it cannot form the basis of a recovery. Repeating a void promise cannot give it validity. So every new agreement in furtherance of, or for the purpose of, carrying into effect any of the unexecuted provisions of a previous illegal agreement is likewise illegal and void. 9 Cyc. 562, citing, among other cases, *Everingham v. Meighan,* 55 Wis. 354, 13 N. W. 269. In the early stages of equity jurisprudence decrees were enforced only *in personam.* 1 Pom. Eq. Jur. (3d ed.) §§ 135, 170. This rule has long since given way to the paramount rule that equity may in all cases so frame its decrees as to make them effective to do equity, and now the forms of equitable relief are as various as the transactions investigated and regulated in equity. *Chippewa B. Co. v. Durand, supra; Smith v. Northwestern Nat. L. Ins. Co.* 123

Wis. 586, 102 N. W. 57; *Ward v. Billups,* 76 Tex. 466, 13 S. W. 308; *Morris v. Bradford,* 19 Ga. 527; *Rowell v. Rowell,* 122 Wis. 1, 99 N. W. 473; *Bresnahan v. Bresnahan,* 46 Wis. 385, 1 N. W. 39; *Bailey v. Champlain M. & P. Co.* 77 Wis. 453, 46 N. W. 339.

By the Court.—The judgment of the circuit court is affirmed.

FALBE and another, Respondents, vs. CAVES, imp., Appellant.

October 9—October 29, 1912.

Execution: Sale: Redemption by mortgagee: Absolute deed as a mortgage: Tender: Evidences of right: Waiver of defects: Filing of papers: Costs: Discretion: Appeal: Questions considered.

1. In an action to enforce a right to redeem lands from an execution sale, a defense that plaintiff had parted with his title, not sustained by any evidence, cannot be considered on appeal.
2. A deed absolute in form, but given to secure the payment of moneys due from the grantor to the grantee, with a contemporaneous contract to reconvey on payment of the debt, establishes the relation of mortgagor and mortgagee between the parties.
3. To entitle a mortgagee to redeem, under sec. 3007, Stats. (1898), from an execution sale, it is not essential that he should have been such mortgagee at the time the sale was made. [Whether one who takes a mortgage after the expiration of the year limited for redemption by the execution debtor can redeem under said section within fifteen months from the date of sale, not determined.]
4. Where, when one entitled seeks to redeem land from an execution sale, the purchaser makes no objection to the papers or proofs presented, but rejects the money tendered on the ground that the offer comes too late, he thereby waives any informality or defect in such proof.
5. When the money required to redeem from an execution sale is properly tendered by one who brings himself within the statute, the redemption is complete, and it is not defeated by his failure to file the evidences of his right in the office of the register

of deeds as prescribed by sec. 3015, Stats. (1898); that provision being for the protection of third persons.

6. It was not an abuse of discretion to award costs to a successful plaintiff in an equitable action to enforce a right of redemption from an execution sale, where no objection was made to the form of the action, and the defendant interposed an equitable counterclaim, and the case was tried before the court as an equity action, although the desired relief might have been otherwise obtained.

APPEAL from a judgment of the circuit court for Marquette county: A. H. REID, Judge. *Affirmed.*

The plaintiff *Blader* claims that on and after June 5, 1903, he was the owner of an undivided one-half interest in certain real estate; that his interest therein was sold by a judgment creditor on an execution sale on October 18, 1904; that before the expiration of one year from the date of said sale he conveyed his interest to his coplaintiff, *Falbe,* as security for a loan, and that thereafter the relation of mortgagor and mortgagee existed between the plaintiffs; that within the fifteen months in which *Falbe* might redeem the premises from the execution sale he tendered to the defendant *J. O. Caves,* who was the purchaser at such sale, the amount necessary to redeem, and at the same time offered to submit proofs showing that he was a mortgage creditor and entitled to redeem; that such tender was refused, and that thereupon *Falbe* deposited the amount thereof in a bank and notified the defendant *Caves* that the money was on deposit and subject to his order, but that *Caves* refused to receive the same. Among other relief the plaintiffs prayed that the sheriff of Marquette county be adjudged to issue a certificate of redemption to the plaintiff *Falbe* and that the defendant *Caves* be adjudged to release to such plaintiff, by the execution and delivery of a proper deed, an undivided one-half interest in and to the premises in suit, on payment of the amount which defendant was entitled to receive.

Among other things the answer denied that *Blader* owned

any interest in the premises when the conveyance was made to *Falbe;* denied that *Falbe* was in fact a mortgage creditor or that he became such within one year from the date of the sale on execution; denied that any legal tender was made to the defendant; and generally put in issue the material allegations of the complaint.

The court found all of the disputed issues in favor of the plaintiffs. It was contended on the trial that *Falbe* did not make a good redemption because he failed to present to *Caves,* at the time of the tender, the proofs required by sec. 3015, Stats. (1898), to show that he was a mortgage creditor and entitled to make the redemption. In reference to this contention the circuit court found that *Caves* made no objection to the effect that *Falbe* had not presented sufficient proof of his interest as a mortgage creditor or that he had failed in any way to comply with the requirements of the law in respect thereto, but that he objected to the right of said plaintiff to redeem solely on the ground that the time limited therefor had expired, making no other objection and raising no other question, and declining to look at or read the proofs furnished as to the relationship between the plaintiffs, thereby inducing *Falbe* to believe that no question was raised as to the sufficiency of the proof of such relationship. The court further found that the defendant *Caves* waived any defects there might be in the proof offered to show that the plaintiff *Falbe* was a mortgage creditor, and estopped himself from claiming that the proofs which *Falbe* had with him to show that fact are or were faulty or defective. From a judgment in plaintiffs' favor the defendant *Caves* appeals.

D. W. McNamara, for the appellant.

Daniel H. Grady, for the respondents.

Barnes, J. This appeal involves the following questions: (1) On October 18, 1904, was the plaintiff *Blader* the owner of an undivided one-half interest in the property involved in

this suit, and thereafter until he conveyed to his coplaintiff, *Falbe,* subject to the lien of the certificate of sale on execution which had been issued to the defendant *Caves?* (2) Did the plaintiff *Falbe* become a mortgagee of the premises? (3) If so, did he become such mortgagee in time to entitle him to redeem the premises from the execution sale within fifteen months from the date thereof under the provisions of sec. 3007, Stats. (1898)? (4) Did *Falbe* in fact redeem said premises from said sale?

1. The appellant insists that the plaintiff *Blader* conveyed the premises in suit to his brother on March 4, 1903, for the purpose of defrauding his creditors; that such deed was declared to be in fraud of creditors in a suit brought by the Dowagiac Manufacturing Company to set the sale aside; that although said deed was set aside in form, it was good between the parties thereto and as to all persons except creditors, and that *Blader* had no right, title, or interest to convey when he executed the deed to his coplaintiff, *Falbe,* on October 18, 1905. Counsel's position is that the judgment declaring the conveyance to be fraudulent did not operate to transfer back to the plaintiff *Blader* any title which he had conveyed away, and a large portion of his brief is devoted to a discussion of this proposition and to the citation of authorities sustaining the arguments advanced. The question is not in the case. No proof was offered either showing or tending to show that *Blader* ever conveyed the land to his brother or that any action was brought to set such conveyance aside. The appellant in his answer alleged that such a deed was given, and set forth the pleadings in the action brought to set the same aside and the findings and judgment of the court. However, the judgment roll in the case was not offered on the trial, and neither was any other evidence offered that we are able to find which established the fact that a conveyance was made. Apparently the defendant lost nothing by failure to make this proof. The findings of the court set up in the answer expressly find that

the deed in question was never delivered. If there was no delivery, it follows as a matter of course that *Blader* did not part with his title. So in the first place it is apparent that the appellant failed to sustain by any proof the allegations of the answer referred to, and, in the next place, that if proof had been made by offering the judgment roll in the action referred to, the appellant would be no better off than he was in the situation in which the case was left.

2. The proof showed quite satisfactorily that on the 18th of October, 1905, the plaintiff *Blader* conveyed to his co-plaintiff, *Falbe,* the premises in question by warranty deed; that such deed, though absolute in form, was a mortgage in fact, and that it was given to secure the payment of money theretofore advanced by *Falbe* to *Blader,* as well as money advanced at the time the deed was made, and that *Falbe* gave *Blader* a land contract back, by the terms of which he agreed to reconvey the lands to *Blader* on payment of the amount of money which *Blader* owed him. There is no doubt under the authorities in this state that this transaction established the relation of mortgagor and mortgagee between the plaintiffs, and that *Blader* was a mortgagee within the meaning of sec. 3007, Stats. (1898), and might redeem from the execution sale, provided he took his conveyance soon enough to entitle him to redeem. *Rogan v. Walker,* 1 Wis. 527; *Orton v. Knab,* 3 Wis. 576; *Plato v. Roe,* 14 Wis. 453.

3. Counsel for appellant contend that the rights extended by sec. 3007 to judgment and mortgage creditors apply only to persons who were such creditors at the time of the sale on execution, and furthermore that in any event *Falbe* did not become a creditor until the expiration of the period within which *Blader* might redeem, and that the statute has no application to such persons as become judgment or mortgage creditors after the expiration of the one-year period. Sec. 3007, Stats. (1898), reads as follows:

"Any creditor of the person against whom such execution issued having, in his own name, or as assignee, representative,

trustee or otherwise, a judgment rendered or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of such sale and which shall be a lien and charge upon the premises sold, by paying the sum of money which was paid on the sale of such premises, together with interest thereon at the rate of ten per cent. a year from the time of such sale, shall thereby acquire all the rights of the original purchaser, subject to be defeated in the manner hereinafter mentioned."

We perceive no reason for limiting the application of this statute to such persons as were judgment or mortgage creditors at the time the execution sale was made. There is nothing contained in it which indicates that the legislature had any intention that it should be so limited. Any judgment or mortgage creditor of the person against whom the execution is issued has the right at any time before the expiration of fifteen months from the time of sale to pay to the purchaser at the sale the amount for which the land was sold, with interest, and he thereby acquires all the rights of the original purchaser. We cannot read into this statute any limitation which would bar judgment and mortgage creditors who became such after the sale was made. The cases hold that this should not be done. *Prescott v. Everts,* 4 Wis. 314; *Martin v. Judd,* 60 Ill. 78; *Densmore v. Tomer,* 14 Neb. 392, 7 N. W. 535; *Pierson v. Hickey,* 16 S. Dak. 46, 91 N. W. 339; *Mandeville v. Avery,* 124 N. Y. 376, 26 N. E. 951. Of course, when we speak of judgment and mortgage creditors, we refer to those creditors whose mortgages or judgments are in fact a lien upon the land sold on execution.

If *Falbe* did not become a mortgage creditor until after the expiration of the year in which the debtor, *Blader,* might redeem, a different question might arise. No such question is involved in the case, however, because the proof is quite satisfactory that *Falbe* became a mortgagee within the year, and the court so finds. What the respective rights of the parties might be had the year elapsed before *Falbe* became a mortgagee we need not determine and we do not determine.

4. We are satisfied that there was a valid redemption made in this case. In arriving at this conclusion we do not attach any significance to the fact that the necessary amount of money to redeem seems to have been paid to the sheriff at one time, because the money was refunded by the sheriff. The proof is undisputed that *Falbe,* within the time in which he was entitled to redeem, if he was in fact a mortgage creditor, secured the necessary amount of money to make a redemption of the lands from the execution sale, to wit, the sum of $1,068.75; that he made a legal tender of such amount to the defendant, and at the same time had with him a certified copy of his deed and of the land contract which he had given back to his coplaintiff, and an affidavit presumably made with the intention of complying with the requirements of sec. 3015, Stats. (1898), although the affidavit was not produced on the trial and neither were its contents disclosed; that the papers were exhibited to the defendant and that he refused to accept the money or to look at the papers, because, he said, the time within which the redemption might be made had expired; that immediately thereafter the plaintiff *Falbe* deposited said money in the bank at the village of Westfield and notified the defendant *Caves* of such deposit and that the money was subject to his order. This tender was kept good up to the time of the trial.

The only weakness about the plaintiffs' case with reference to the matter of tender arises out of the fact that there was no proof showing that the defendant was informed that *Falbe* claimed to be a mortgage creditor, and the proof is also silent as to whether or not the affidavit which *Falbe* had in his possession and which was drawn by a lawyer complied with the requirements of sec. 3015, Stats. (1898). But the plaintiff did not reject the tender because of any defect or of any insufficiency of the proofs which *Falbe* had in his possession. He took the ground that the offer came too late, and refused to either count the money or look at any of the papers which

Falbe had in his possession and which he offered to exhibit to the defendant. He testified: "I was denying the right to redeem to him simply on the ground that I thought the time had expired. I was not denying it because he had not proven to me that he was not the mortgagee of *Mr. Blader.*" By this conduct defendant waived the right to complain of any informality there might have been as to the papers which *Falbe* had with him, if it be conceded that such informality existed. *Sexton v. Rhames,* 13 Wis. 99, 101; *Badgley v. Ward,* 37 Cal. 121, 99 Am. Dec. 256, 259; *Bank of Vergennes v. Warren,* 7 Hill (N. Y.) 91, 93. If defendant had rejected the tender because the proofs were insufficient in any respect, there was ample time within which the plaintiff *Falbe* might supply the defects in his proofs and still renew his tender before the period of redemption expired.

It is also urged that there was no redemption in this case because the following requirement found in subd. 4 of sec. 3015, Stats. (1898), was not complied with:

"Within three days after making such redemption or purchase such creditor shall file such evidences of his right in the office of the register of deeds of the county where the original certificate of sale is filed."

We do not think that the failure to comply with this provision of the statute defeated redemption. There either was or was not a good redemption at the time the tender was made. If there was, it was not defeated by the failure of *Falbe* to make the required filing. This does not appear to be a provision of law intended for the benefit of the purchaser at the execution sale, but rather one that is made for the protection of third persons who might desire to acquire title to or secure an interest in the premises sold. *Chautauque Co. Bank v. Risley,* 4 Denio, 480, 484.

It is argued that the court erred in awarding costs against the defendant *Caves,* because it was wholly unnecessary to bring a suit in equity to obtain the desired relief. However

that may be, the equitable action was brought, no challenge was made, by either demurrer or answer, to the form of the action, the defendant interposed an equitable counterclaim and asked for equitable relief, the case was tried before the court as an equity action, and we are unable to see wherein the court abused its discretion or otherwise violated the law in awarding costs.

By the Court.—Judgment affirmed.

HAMMOND, Respondent, vs. CAPITAL CITY MUTUAL FIRE INSURANCE COMPANY, Appellant.

October 9—October 29, 1912.

Fire insurance: Latent ambiguity in policy: Parol evidence of negotiations: Partnership and individual property.

1. Where, upon applying a writing to the subject matter to which it relates, a latent ambiguity appears therein, parol testimony of the facts and circumstances surrounding its execution, including conversations and negotiations between the parties, may be received to solve the ambiguity.
2. A policy insured "Hammond Bros." against loss or damage by fire to "household goods"—including specifically, among other things, household furniture, family wearing apparel, family stores and supplies, watches and jewelry in use,—located in a building occupied by assured as a hotel and saloon. It appearing that two brothers carried on a partnership business under the firm name of Hammond Bros. and had partnership property in such building, and that each had individual property therein, there was a latent ambiguity in the policy as to whose property was insured under the term "Hammond Bros.," and parol evidence was properly admitted to show that, in a conversation between one of the brothers and the agent of the insurer prior to the delivery of the policy, it was agreed and understood that the insurance should cover the individual property of each partner as well as the partnership property.

APPEAL from a judgment of the circuit court for Marquette county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action upon a fire insurance policy. It appears that the defendant company sometime in October or about the 1st of November, 1909, took over the business of another insurance company known as the Poynette Mutual Fire Insurance Company and issued new policies to its members. About November 1, 1909, it delivered to plaintiff a Wisconsin standard form policy reciting that defendant "in consideration of the stipulations herein named and $4.38 premium does insure Hammond Bros., of Westfield, Wisconsin, from the 1st day of November, 1909, at noon, to the 20th day of July, 1911, at noon, against all direct loss or damage by fire and lightning, except as hereinafter provided, to an amount not exceeding $700, to the following described property while located and contained as described herein and not elsewhere, to wit, $700 on household goods as per form attached, all while contained in the two-story composition and gravel, cement block building situated on lot 1, block 'C' in the village of Westfield, Wisconsin, occupied by assured as a hotel and saloon." The rider attached was as follows:

"On household furniture and utensils, useful and ornamental, including beds, bedding, linen, family wearing apparel and materials for same, plate, plated ware, printed books and music, musical instruments (excepting pianos and organs), mirrors, portraits, pictures, paintings, engravings and their frames (no picture, painting nor engraving to be valued at more than cost), watches and jewelry in use, fishing tackle, firearms, sewing machines, trunks, umbrellas, fuel, family stores and supplies, all while contained in the above described building."

This policy was issued upon an application presented to the Poynette Mutual Fire Insurance Company in which the words printed thereon, to wit, "household goods, piano or organ," were stricken out by crosses made with a pen, and the words "hotel furn. & fix." inserted by pen in place thereof. In the rider attached to the Poynette policy describing the property the word "household" was stricken out by a pen line drawn

through the same and the word "hotel" written in place thereof, so that it read: "$700 on hotel furniture and utensils," etc.

The complaint alleged that the defendant, by virtue of the terms and conditions of the policy described, insured the property of the plaintiff, which was destroyed, with other property belonging to the plaintiff and his co-insured, Zera Hammond, in addition to the joint property of the said plaintiff and the said Zera Hammond, so that the policy covered the individual property of the plaintiff, the individual property of his brother, Zera Hammond, and the partnership property of Hammond Bros. It further alleged that the defendant, previous to the issuance of the policy, was informed of the separate ownership of the property contained in the building described, and that it was specifically agreed between defendant and plaintiff and Hammond Bros. and Zera Hammond that the policy of insurance should cover the individual property of each of the partners as well as the partnership property, and that it was further distinctly understood and agreed by and between the plaintiff herein and said Zera Hammond and said copartnership of Hammond Bros. that all of said property in said hotel building so described, referred to in said policy and covered thereby, should be described and insured as the property of Hammond Bros.

The answer denied any liability to the plaintiff upon any cause of action and alleged that the defendant, on or about November 1, 1909, issued and delivered its policy of insurance to Hammond Bros., wherein and whereby it did insure the property of Hammond Bros. only, and it specifically denied that said policy by its terms covered any individual property belonging to the plaintiff or his copartner. It further alleged that the policy was executed and received by said Hammond Bros. on or about the day of its issue, and retained by said Hammond Bros. without any objection being raised by them or either of the individuals that composed the firm of Hammond Bros.

The jury by a special verdict found (1) that Johnson (the agent of defendant) and *Philo Hammond* (the plaintiff) had a conversation prior to the delivery of the policy in suit relative to insurance with the defendant company; (2) that it was agreed at said time that a policy would be taken in the defendant company; (3) that Johnson and *Philo Hammond* both intended and understood at said time that the partnership property of Hammond Bros. and the individual property of each partner situated in the building was all to be insured by said policy; (4) that Johnson knew at said time that part of the property in the building intended to be insured belonged to the partnership of Hammond Bros. and part to the partners individually; and (5) that the actual value of the property destroyed by fire was $400.

On such verdict the court entered judgment in favor of the plaintiff, from which the defendant appealed.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.*

For the respondent there was a brief by *D. W. McNamara* and *Anna B. Hull,* and oral argument by *Anna B. Hull.*

VINJE, J. The principal error assigned is that the plaintiff was allowed, against objection by defendant, to testify as to the substance of conversations had between himself and defendant's agent, Johnson, previous to the issuance of the policy, wherein the different ownerships of the property contained in the hotel building was claimed to have been disclosed to Johnson and the property pointed out to him, and wherein, plaintiff testified, it was expressly agreed that the policy to be written should cover his individual property, the individual property of his brother, Zera Hammond, and the partnership property. The policy insured Hammond Bros. It appeared that in the building described in the policy the plaintiff and his brother, Zera Hammond, carried on a partnership business known as Hammond Bros., and had partnership property therein; that plaintiff and his brother each also had in-

dividual property therein, and the question arises, What is the meaning of the term "Hammond Bros." as used in the policy? Is it descriptive of the brothers Zera and *Philo Hammond,* or is it used to designate the partnership? If the latter, then it would exclude individual property. If the former, it would include individual as well as partnership property. *Castner v. Farmers' Mut. F. Ins. Co.* 46 Mich. 17, 8 N. W. 554; *Foster v. U. S. Ins. Co.* 11 Pick. 85; *Lenagh v. Commercial Union Assur. Co.* 77 Neb. 649, 110 N. W. 740; *Peck v. New London Co. Mut. Ins. Co.* 22 Conn. 575. See, also, *Siemers v. Meeme Mut. H. P. Ins. Co.* 143 Wis. 114, 126 N. W. 669, and cases cited. The ambiguity in the term became apparent when by extrinsic evidence it was made to appear that the building in which the insured property was located contained property owned individually and also property owned by the partnership. Such ambiguity was emphasized by the term "household" furniture, used in the policy in question, instead of the term "hotel" furniture, used in the superseded policy, and also by the terms "family wearing apparel," "family stores and supplies," "watches," "jewelry," etc., presumably not owned by a partnership in the hotel and saloon business. So it appears that the trial court was correct in holding that upon the facts disclosed there was a latent ambiguity in the contract of insurance, viz., Whose property was insured under the term "Hammond Bros."? To solve such ambiguity he permitted plaintiff to testify to what was said upon that subject by the parties at the time the contract was entered into, for the purpose of ascertaining in what sense they used the term "Hammond Bros.," whether as descriptive of the persons Zera and *Philo Hammond* or as designating the partnership. Was the reception of such testimony error? The rule is elementary that parol testimony is not admissible to contradict, vary, add to, or take from the terms of a valid written instrument. 1 Greenl. Ev. (15th ed.) § 275; 2 Taylor, Ev. (10th ed.) § 1132; Jones, Ev. (2d ed.) § 434 (437–439).

But when, upon applying the writing to the subject matter to which it relates, a latent ambiguity appears therein, then parol testimony of the facts and circumstances surrounding its execution may be received to solve the ambiguity. Jones, Ev. (2d ed.) § 453 (458, 459). Such testimony neither contradicts, varies, adds to, nor takes away from the writing. It merely aids in determining the true meaning thereof. *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661; *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43. The meaning so arrived at must not be inconsistent with the language of the writing, but it may limit such language to a particular meaning which is included therein, and exclude another meaning which the language may also bear. The office of such testimony is, within the meaning of the terms employed in the writing, to render certain that which is uncertain, and to determine just what in fact the writing was intended to express. *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661. That such ambiguity may be solved by parol proof of extrinsic facts and circumstances surrounding the execution of the writing is the general doctrine announced by text-writers and courts alike. 1 Greenl. Ev. (15th ed.) § 297; Jones, Ev. (2d ed.) § 453 (458, 459). That parol proof of conversations or negotiations had between the parties at the time of the execution of the writing which serves to construe a latent ambiguity therein is also admissible, is established by both early and late decisions of our court. *Ganson v. Madigan,* 15 Wis. 144; *Becker v. Holm,* 89 Wis. 86, 61 N. W. 307; *Rib River L. Co. v. Ogilvie,* 113 Wis. 482, 89 N. W. 483; *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631; *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43; *Pedelty v. Wis. Zinc Co.* 148 Wis. 245, 134 N. W. 356. True, a number of cases may be found in which language to the contrary is used in the opinions, and also a few cases in which a decision has been made not in harmony with the rule here announced. But no good ground is perceived why parol proof of such conversations

or negotiations is not admissible to solve a latent ambiguity in a writing, thus enabling the court to determine upon what precise subject matter the minds of the parties met. Nothing in the writing is thereby contradicted, nothing subtracted, and nothing added. The meaning read out of the writing in the light of such parol proof must be included therein; that is, the language used must be susceptible of the construction which the parol testimony tends to support. The conversations or negotiations are resorted to merely for the purpose of ascertaining the actual meaning ascribed to the ambiguous term by the parties themselves when the writing was executed. Such conversations or negotiations, therefore, become in a sense characterizing circumstances surrounding the execution of the writing, as expressed in *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43, and *Pedelty v. Wis. Zinc Co.* 148 Wis. 245, 134 N. W. 356, and serve to show what the writing meant when it was made and what it now in fact means, as expressed in *Burton v. Douglass,* 141 Wis. 110, 123 N. W. 631. So we conclude there was no error in the reception of the testimony to which objection was made.

It is urged that since the policy was retained by plaintiff for a period of more than fourteen months without making any objection to the term describing the assured, the written contract is conclusively presumed to represent the actual agreement. Both the trial court and this court have so treated the policy. It is held to represent the actual contract made, and in order to determine what that contract was and is, as written, the testimony which aided in rendering certain the meaning of the term "Hammond Bros." was received.

Error is also assigned because the evidence does not support the first finding of the jury, and because the court refused to set aside findings 2, 3, and 4. A careful examination and consideration of the evidence does not convince us that the assignment of error is well taken.

By the Court.—Judgment affirmed.

WALBRIDGE, Respondent, vs. BERLIN PUBLIC SERVICE COMPANY, Appellant.

October 9—October 29, 1912.

Public utilities: Rules: Approval by Railroad Commission: Discontinuing service: Injunction: Jurisdiction of circuit court.

[1. Whether, in view of secs. 1797*m*—64 to 1797*m*—66 of the public utilities law (ch. 499, Laws of 1907), a circuit court other than that for Dane county had jurisdiction to entertain an action by a private individual to restrain a public utility from discontinuing its service to the plaintiff because of his refusal to comply with rules filed by the utility with the Railroad Commission,—no formal order approving such rules having been made by the commission or being expressly provided for in the law, and there being no express provision requiring the commission to investigate into the reasonableness of such rules upon the complaint of a single citizen,—not determined.]

2. A rule of a public utility company supplying hot water for heating purposes, providing for installation of thermostats by the company at cost, being on its face reasonable, and there being no showing that the cost would be great or that the time necessary for installation would be so long as to materially interfere with the comfort or health of the occupants of plaintiff's house and no contract existing by which the company was bound to furnish heat to plaintiff for any fixed time, there was no ground for interference by a court of equity to restrain the company from discontinuing its service because of plaintiff's refusal to comply with said rule and permit the company to install a thermostat.

APPEAL from an order of the circuit court for Green Lake county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

This is an appeal from an order denying a motion to vacate a preliminary injunctional order. The injunctional order was obtained from a court commissioner at the commencement of the action, February 12, 1912, upon the complaint alone, and enjoined the defendant (a public utility corporation supplying hot water for heating purposes) from disconnecting the pipes in the plaintiff's house in Berlin from the defendant's mains, and from discontinuing its service of hot water to the house during the pendency of the action.

The complaint alleged that plaintiff's house had been heated by hot water furnished by defendant through its mains since September 1, 1905; that plaintiff contracted with defendant September 1, 1910, for heat for the season ending May 15, 1911, for the sum of $107.20 to be paid in certain monthly instalments; that the heat was furnished and the instalments regularly paid for that season, and that in September, 1911, the contract was renewed for another season; that the heat was furnished by the defendant under the renewed contract and the instalments paid up to and including the instalment due February 1, 1912; that defendant in January, 1912, pretended to adopt and establish certain rates and rules, and on February 5, 1912, served a copy of the rules on the plaintiff with a notice that unless he complied with rules 5, 6, and 14 by February 10th the service of heat would be discontinued. The rules so referred to are as follows:

"5. *Discontinuance of service.* The company reserves the right, upon five days' notice, to cut off its service for nonpayment of bills, for failure to comply with its rules and regulations, or to guard against fraud or loss. In case the service has to be discontinued under this clause, a charge will be made for turning on the water of an amount equal to the actual cost of shutting off and turning on the water.

"6. *Equipment paid by consumer.* All service mains, radiators, thermostats, valves, piping and fitting are to be paid for and maintained by the consumer.

"14. *Thermostats.* The company reserves the right to furnish and install all thermostats connected to its heating system at or as near cost to the consumer as they can be installed, and to adjust and maintain the same at all times, other than breakage by the consumer or worn out parts, which supplies and repairs shall be made by the company at cost to the consumer."

The complaint further charged that the pipes and valves in the plaintiff's house, including the thermostat therein, were in the same condition at the time the notice was served as in previous years; that his aged mother-in-law, suffering from

severe illness, lived with him; that his house could not be properly heated in any other way than by the hot water from the main; that in case of discontinuance of service the necessary changes could not be made except with long delay, and that he would suffer irreparable injury thereby during the cold winter months.

By the answer it was alleged that the rules aforesaid were adopted and filed with the Railroad Commission in December, 1911, and have been effective since January 1, 1912, and that no action had ever been brought to change the same as provided by ch. 499 of the Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108, Stats.); that the plaintiff refused and still refuses to allow the defendant to install a proper thermostat in his home, and that the notice of discontinuance was given for that reason.

The motion to vacate the injunction was based upon the answer and certain affidavits, as well as upon the examination of the plaintiff taken under sec. 4096, Stats. It appeared by the plaintiff's own testimony taken upon this examination that there was "no agreement between the company and myself in September, 1911," and none since that time; that there were several conversations in October and November, 1911, in which the parties wrangled over the question of whether plaintiff should put in a thermostat, and the final result was that it was understood the company would go on and furnish heat and the plaintiff would put in a thermostat if the Railroad Commission said he had to do so; that the plaintiff had in his house a contrivance which he considered was a sufficient thermostat, namely, a very sensitive thermometer, hung in the warmest room in the house, which rings a bell when 74 degrees is reached, which bell continues to ring until some person goes to the common room of the house and turns a wheel valve handle controlling the shut-off valve in the basement; that heat was furnished by the defendant, and that the plaintiff paid the monthly instalments up to and including the in-

stalment of February 1st, when the notice of discontinuance was served. It also appeared by the affidavits of experts that the apparatus called a thermostat by the plaintiff was not a thermostat in fact, because it did not automatically control the heat; that the rules aforesaid were filed with the Railroad Commission and became effective January 12, 1912, but that no formal order had been made by the commission approving the rules before the commencement of the action. Upon this showing the circuit court declined to vacate the temporary injunction, and the defendant appeals.

For the appellant there was a brief by *John J. Wood, Jr.*, and *McCabe & Dahlman*, and oral argument by *Mr. Wood.*

Perry Niskern, for the respondent.

Winslow, C. J. The principal contention of the appellant is that under the public utilities law (ch. 499, Laws of 1907, and the subsequent amendments thereto), by which all public utilities are placed under the control of the Railroad Commission, the trial court had no jurisdiction to make the temporary injunctional order in question or entertain this action, because by that law the circuit court for Dane county alone can entertain such action, and it must be brought against the Railroad Commission itself.

The law provides for the filing with the commission of rates and rules by every public utility (secs. 1797*m*—27, 1797*m*—28). It also provides that certain specified corporate bodies and twenty-five individuals, firms, or corporations may make complaint to the commission against either the rates or rules, and that the commission shall thereupon make investigation as to the subject matter of the complaint (sec. 1797*m*—43). It also provides that a summary investigation as to the reasonableness of rates, adequacy of service, or any matter relating to the utility, may at any time be made by the commission of its own motion (sec. 1797*m*—49). Notice of hearing in either case is to be given, and at the conclusion the com-

mission is given power to substitute new rates or change the existing rules, or require proper service by order which must thereafter be obeyed by the utility (secs. 1797*m*—46, 1797*m*—60, 1797*m*—61).

The law then provides that the public utility itself or any person or corporation in interest dissatisfied with "any order of the commission fixing any rate or rates, tolls, charges, schedules, joint rate or rates or any order fixing regulations, practices, act or service" may sue the commission in the circuit court for Dane county to vacate the order within ninety days after the rendition of the order, and that all right of action or recourse to the courts shall cease absolutely at the end of the ninety-day period; further, that no injunction staying such order shall issue except on application to the circuit court or presiding judge thereof upon notice to the commission (secs. 1797*m*—64, 1797*m*—65, 1797*m*—66).

The law does not in express terms provide that any formal order shall be made by the commission approving the schedules of rates or the rules filed by the public utility upon the filing of the same; nor does it provide in express terms that the commission shall be required to investigate into the reasonableness of the rates or rules adopted by any utility and filed upon the complaint of a single citizen; hence the plaintiff in the present case argues that the circuit court for Green Lake county had not been deprived of jurisdiction, because no order had yet been made which could be reviewed in an action brought against the commission under the provisions of the law in the circuit court for Dane county.

The question is not free from difficulty, and we express no opinion upon it either way because we find it entirely possible to decide this appeal upon other grounds. We have stated the contention here for the reason that it would seem that it is a matter which may well be brought to the attention of the legislative branch of the government, to the end that by proper amendment of the law the doubt may be cleared up.

Upon the merits of the case we think the temporary injunctional order should have been vacated.

On the face of it the rule requiring the installation of a thermostat seems entirely reasonable. A thermostat means an automatic regulator of heat (*Murphey v. Weil,* 92 Wis. 467, 66 N. W. 532), and this the plaintiff did not have. By his own affirmative testimony it appears that he had no entire contract with the defendant company to furnish heat for the season, but simply an arrangement that the defendant would go on and furnish heat for a time not fixed, and that the Railroad Commission was to be appealed to to decide whether a thermostat should be put in. The cost of putting in a thermostat nowhere appears, nor the time required to install it. There can be no presumption, in the face of common knowledge on the subject, that the cost would be great or the time necessary for installation would be so long as to materially interfere with either the comfort or the health of the occupants of the plaintiff's house. When it appeared by the plaintiff's admission that he had no season contract with the defendant, there remained no ground upon which a court of equity could be called upon to interfere, and the preliminary injunctional order should have been at once vacated.

By the Court.—Order reversed, and action remanded with directions to vacate the preliminary injunctional order.

PEOPLE'S TELEPHONE COMPANY, Appellant, vs. LEWIS, Respondent.

October 9—October 29, 1912.

Public utilities: Telephones: Special contract for service: Validity: Discrimination.

1. A special contract, executed prior to April 1, 1907, between a telephone company and a stockholder therein and embodied in the stock certificate issued to him upon his subscription therefor and payment of the par value and ten per cent. additional, stipulating that he should possess, as owner, one telephone and be entitled to the use of the company's lines in common with those having rented telephones in the same locality, subject to assessments upon the stock sufficient to pay the corporate expenses, but not exceeding $10 per year, was valid under sec. 1797*m*—91, Stats. (Laws of 1907, ch. 499).
2. In the absence of proof that it is *unreasonably* discriminatory, such a contract does not come within the condemnation of the common law.
3. Mere difference in method of dealing with customers, some by implied agreement to pay at schedule rates, and others by express contract, is not discrimination within the meaning of sec. 1791*a*, Stats. (1898).

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover for telephone service. The amount claimed was $1 per month for thirty months. The answer admitted receiving the service but pleaded a contract, antedating the public utility law, to the effect that the price for such service should not exceed $10 per year. This was alleged: In 1902 defendant subscribed for and became the owner of one share of the common stock of the defendant of the par value of $50, paying therefor $55, under an agreement that he should be furnished telephone service for, not exceeding a charge of $10 per year and that such agreement was embodied in and became a condition of the certificate of stock.

The cause was tried by the court. Facts were found as follows: Plaintiff is a duly organized telephone company under the laws of Wisconsin and has been since August, 1902. During such time defendant has had of plaintiff the use of its telephone service without paying therefor since January 1, 1909. The service was furnished pursuant to a contract made in August, 1902, and embodied in plaintiff's certificate of corporate stock No. 55, issued to defendant upon his subscription therefor and payment of the par value and ten per cent. additional. The contract stipulated that the holder of the stock should possess, as owner, one telephone and be entitled to the use of plaintiff's lines, in common with those having rented telephones in the same locality, subject to assessments, ratably, upon all common stock sufficient to pay the corporate expenses; but not exceeding $10 per year. The amount assessable against the common stock for 1908 was not anything, for 1909 $10, and for 1910 $10.

Upon such facts it was held that the contract relied upon was not contrary to any law existing at the date thereof and was the measure of defendant's liability. Judgment was rendered accordingly.

Daniel H. Grady, for the appellant.

For the respondent there was a brief by *Rogers & Rogers,* and oral argument by *H. B. Rogers.*

Marshall, J. The questions presented in this case are not new. All of them have been, either directly or substantially, repeatedly decided by this court in opinions in which attempts were made to so fully analyze the public utility law as to relieve administration of it as free from embarrassment as practicable. *Superior v. Douglas Co. Tel. Co.* 141 Wis. 363, 122 N. W. 1023; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 129 N. W. 600; *Calumet Service Co. v. Chilton,* 148 Wis. 334, 135 N. W. 131.

Very little, if anything, need be added to what is said in the cases referred to as to the questions there discussed. The better way, it seems, as the same questions again happen to be pressed upon our attention, is to treat them as ruled by the previous decisions without additional discussion.

What has been said suggests impropriety of treating the multitude of authorities, foreign and domestic, cited to our attention.

The point that the contract with defendant was discriminatory at common law is met by *Superior v. Douglas Co. Tel. Co., supra,* holding that only unreasonable discriminations are so condemned, and absence of proof that there was any such discrimination in this case.

The suggestion that the special contract with defendant and others of his class is void under sec. 1791*a,* Stats. (1898), requiring every telephone company engaged in the business of furnishing telephone service to do so "without discrimination" is met by the fact that mere difference in method of dealing with customers, some by implied agreement to pay at schedule rates and others by express contract, was not considered by the legislature in passing the public utility law, discrimination within the meaning of sec. 1791*a.* Evidently such section was regarded as a mere incorporation of the common rule into written law, because sec. 1797*m*—91, Stats. (Laws of 1907, ch. 499), specifically recognized the existence of special contracts and provided that "the furnishing by any public utility, of any product or service at the rates and upon the terms and conditions provided for in any existing contract executed prior to April 1, 1907, shall not constitute a discrimination within the meaning specified,"—referring to the provision of the section making any undue or unreasonable preference unlawful. Such section was held, in *Superior v. Douglas Co. Tel. Co., supra,* to have been intended to preserve existing agreements with public utility corporations from being affected by the public utility law, and to be efficient for that purpose as to mere contractual matters such

as ordinarily occur *inter partes.* That was affirmed in *La Crosse v. La Crosse G. & E. Co., supra,* such ordinary contracts as the one in question being distinguished from such as form an element of a corporate franchise, the latter being held superseded by the public utility law, and the former within the limitation mentioned in sec. 1797*m*—91 and so expressly preserved and recognized as valid.

The foregoing seems to cover everything which needs treatment on this appeal. The case presents the question of whether a mere special contract with a public utility corporation for services, made prior to the time limit mentioned in sec. 1797*m*—91, one not inhering in a corporate franchise, and so superseded by the public utility law; but, an ordinary agreement for service, recognized as valid and expressly given validity by such section,—can be relied on by one party thereto as binding on the other seeking to repudiate it. No reason is perceived why the answer should not be in the affirmative as it was below.

By the Court.—The judgment is affirmed.

Barnes, J., took no part.

James, Respondent, vs. James, Appellant.

October 9—October 29, 1912.

Contracts: Master and servant: Farming on shares: Joint adventure: Breach: Measure of damages.

Under a contract whereby plaintiff was to work defendant's farm for one year and was to be paid for his services by a share of the crops and of the increase of the stock, which provided that the parties should jointly occupy the dwelling house and share certain household expenses, that plaintiff should work out the road tax, should leave certain amounts of cut stove wood on the premises for defendant's use, and should pay the expense of

stallion service, and which gave plaintiff the right to control certain matters as to raising crops and stock, materially affecting the probable results of the year's farming, the relationship of the parties was not strictly confined to that of master and servant, but they were to a certain extent engaged in a joint adventure; and upon a breach by the defendant, preventing plaintiff from completing the cultivation and harvesting of the crop, plaintiff's damages were properly measured by the value of his share of the crops and of the increase of the stock at the time of such breach.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

In 1899, when the plaintiff was about thirteen years of age, he became a member of the defendant's family. There was, so far as appears, no blood relationship between them. The plaintiff was treated as a son and took the defendant's name, but he was not legally adopted by the defendant. About December 1, 1908, the plaintiff married and brought his wife to live in the defendant's home. At this time the plaintiff entered into an oral agreement with the defendant to work the defendant's farm for one year. In March, 1909, the contract was reduced to writing. The plaintiff was to be paid for his services by a share of the crops, a share of the products of the milk sold, and by a share of the increase of the stock of the farm.

From time to time there was trouble between the parties as to the management of the farm, and on July 9, 1909, in an altercation of this character, the defendant ordered the plaintiff from the premises. The plaintiff left the farm with his wife and went to the home of his wife's parents. On July 12, 1909, the defendant requested the plaintiff to return to the farm to complete the contract. This the plaintiff declined to do.

In December, 1909, the plaintiff began this action to recover his damages because of defendant's breach of the contract. He reduced his demand by $100, the amount he had

been able to earn between July 9, 1909, and December 1, 1909. For a second cause of action he asked judgment for the value of services rendered the defendant after he became of age and before the contract in suit was made.

The referee found that the plaintiff was not entitled to compensation for services rendered by him after he became of age and before the making of the contract in suit, because the services were rendered by the plaintiff in the position of son to the defendant, that the plaintiff had lived at defendant's home as a member of the family and had received all his necessaries, and that the services rendered were gratuitous. He also found that on July 9, 1909, when the contract was breached, the plaintiff was entitled to damages in the amount which was the value of his share of the proceeds of the farm on that day and which he had not theretofore received as his share from milk sold.

Judgment was awarded by the court in accord with the findings of the referee for the value of plaintiff's share in the crops and the increase of stock on July 9, 1909. This is an appeal from the judgment so rendered.

For the appellant there was a brief by *Earl P. Finch,* attorney, and *H. E. Swett,* of counsel, and oral argument by *Mr. Swett.*

For the respondent the cause was submitted on the brief of *W. J. Foulkes,* attorney, and *W. J. Neville,* of counsel.

Siebecker, J. The referee and trial court treated the complaint as alleging a demand for damages for breach of the agreement by the defendant and held that the measure of plaintiff's damages was the value of his share of the crops and increase of the stock at the time of such breach of agreement. The appellant assails this determination of the rights of the parties upon the ground that the plaintiff's demand in the action and the judgment awarded him is upon a *quantum meruit.* We are persuaded that this contention is not the cor-

rect interpretation of the nature and the result of the action. The relationship of the parties springing from some of the features of the contract has been likened to that of master and servant, but there are other features not strictly within the relation of master and servant, such as plaintiff's duty to pay, by working on the highways, the road tax on the premises, and his obligation to leave certain amounts of cut stove wood on the premises for the defendant's use, and to pay the expense of stallion service; and also the provision that both parties should jointly occupy the dwelling house on the premises and share the cost of certain household expenses during the contract term. We are of opinion that the trial court very properly held that the relationship of the plaintiff and the defendant under this contract was not strictly confined to that of master and servant, and that by reason of some special features of the agreement the contract "partakes somewhat of the nature of an adventure, entitling the party to a chance in the profits or benefits derivable therefrom." *Bowers v. Graves & V. Co.* 8 S. Dak. 385, 66 N. W. 931; *Taylor v. Bradley,* 39 N. Y. 129. See, also, *Cull v. San Francisco & F. L. Co.* 124 Cal. 591, 57 Pac. 456; *Lanyon v. Woodward,* 55 Wis. 652, 13 N. W. 863.

It is to be observed that the features to which we have called attention create contractual obligations in addition to those providing a compensation for plaintiff's time, as is usual in the ordinary contract for services. From these it appears that the plaintiff had the right of electing to raise colts on the farm and of otherwise controlling affairs on the farm, as to raising crops and stock, which materially affected the extent and probable result of the year's farming enterprise and measurably controlled the value of the proceeds of his contract. We are persuaded that the referee correctly found that the defendant breached the contract on July 9, 1909, before it expired on December 1st, following, and that such breach caused plaintiff damages, since he was thereby pre-

vented from completing the cultivation and harvest of the growing crops and from receiving the benefit of his interest in the increase of the stock, of which the defendant had deprived him by compelling plaintiff and his wife to leave the farm. Under these circumstances the plaintiff's damages would be the value of his share of such crops and increase in stock at the time of the breach. The referee ascertained this damage so far as the evidence adduced established it. This, in our view of the case, was a proper mode of fixing the amount of damages suffered by plaintiff on account of defendant's breach of contract, and determined the value of the contract to plaintiff at that time.

Since the damages awarded were not based on the ground of discharge before expiration of an employment contract for a definite time, there could be no claim for damages for constructive services, and the question of plaintiff's obligation to hold himself in readiness to perform cannot arise and need not be considered.

The court properly awarded judgment in plaintiff's favor on the report of the referee.

By the Court.—Judgment affirmed.

CHILDS, Appellant, vs. DAHLKE and others, Respondents.

October 10—October 29, 1912.

Plats: Width of street: Nuisance: Building erected in street: Abatement: Waters: Hydraulic canal: Riparian rights: Ownership of stated amount of water power: Rights and remedies.

1. Evidence showing, among other things, that a platted street, at the only point where its width was indicated in figures, was marked distinctly "49½ wide;" that the public travel was generally confined to that width; and that the south line of an hydraulic canal, shown on the plat but not constructed until afterward, was sixty-six feet north of the south line of the

street and was intended by the person who made it to be constructed entirely on her own land, is *held* to sustain a finding that the street was only forty-nine and one-half feet wide and that it did not border upon the canal.

2. In such case the fee of lots abutting on the south side of the street stops at the center of the street, and the owners have no riparian privileges on the canal, regardless of whether it is navigable or not.

3. Plaintiff was the owner of certain lots on the south side of the street, with the right by deed to draw for use thereon 150 inches of water from the hydraulic canal, and had exercised such right for more than twenty years by means of a conduit crossing the street and the strip of land north of it and entering the canal opposite his lots. After a flood had destroyed the works in part and washed away portions of the street in front of plaintiff's lots and the land north of it, defendants restored the land which was washed away, shortened the canal, and constructed an electric lighting plant in part upon the street in front of plaintiff's premises and in part upon the strip of land north of the street, thereby making it impossible for plaintiff to obtain his 150 inches of water as before or without increased expense. *Held*, that plaintiff was entitled to have the lighting plant, so far as it encroached upon the street (but not beyond that), abated as a nuisance, and that defendants should be required at their own expense to make the proper changes, constructions, and connections with the canal so as to effectively deliver to plaintiff the 150 inches of water to which he was entitled, at the north line of his lots.

APPEAL from a judgment of the circuit court for Marquette county: A. H. REID, Judge. *Modified.*

This action was brought to quiet plaintiff's title to mill lots 6 and 7 of the recorded plat of Neshkoro in Marquette county, together with 150 inches of water to be drawn from the mill-pond and hydraulic canal at any point on said lots under ten-foot head, to be measured in the conductor where it issues on the wheel or wheels, and to abate as a nuisance a certain power house and building erected by defendants in "Mill street," which it is alleged shut off access to and use of water and power on the premises; and to compel the defendants to restore the dam and hydraulic canal and fill up Mill street between plaintiff's lots and the canal and river, and to restore

the same to their former condition as they existed prior to the flood of June 6, 1905; and immediately to build and perpetually maintain a suitable bulkhead and gate in the canal for the plaintiff's use in taking said 150 inches of water therefrom, and to permit proper connection to be made therewith by plaintiff between said lots and said dam and canal substantially as existed prior to June 6, 1905; and for damages and injuries to plaintiff's property and for other relief.

The village of Neshkoro, including the land in controversy, was platted by Helen M. White, proprietor, September 21, 1852, and recorded September 25, 1852. The diagram on page 85, taken from the plat, shows the premises in question.

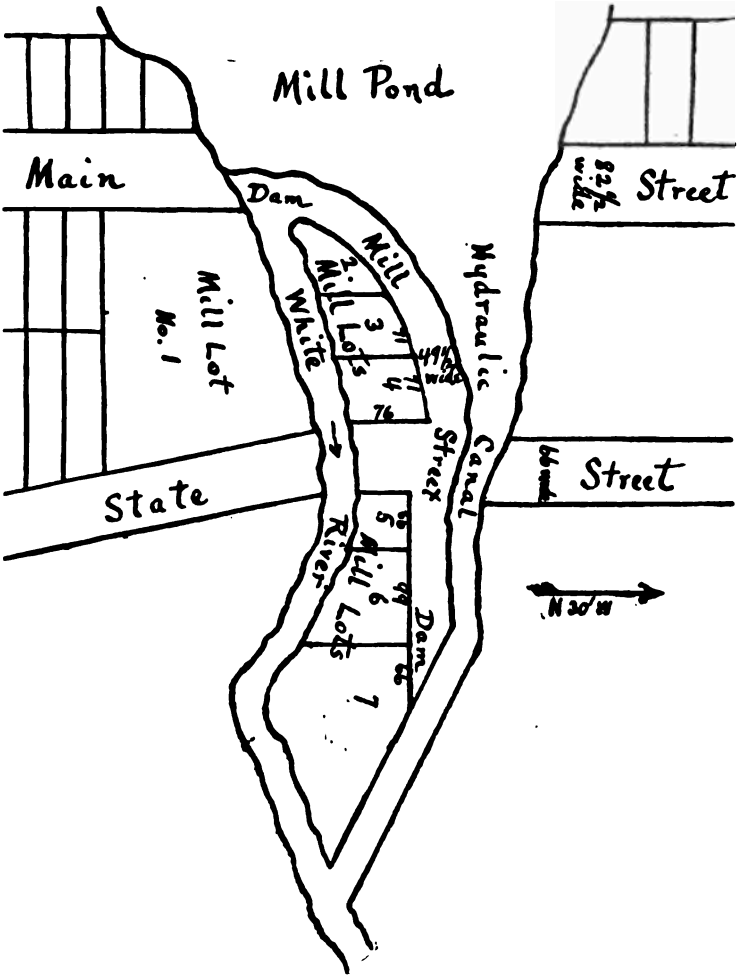
The defendants answered by way of admissions and denials. The court made very full findings upon all the questions of fact litigated upon the trial and rendered in accordance with said findings the following judgment (omitting formal parts):

"It is considered and adjudged:

"1. That the plaintiff was, at the time of the commencement of this action, and now is, the owner in fee simple absolute, of mill lots 6 and 7, fronting on Mill street, in the plat of the village of Neshkoro, in Marquette county, in the state of Wisconsin, together with the right to draw and use 150 inches of water from the mill-pond and canal described in the complaint and in said findings, for power, at any point on said lots 6 and 7, under a head of ten feet, and rights appurtenant thereto, the water to be measured at the conductor where it issues onto the wheel or wheels on said mill lots 6 and 7, and his rights and interest in said premises as such owner in fee simple, and his rights and interest in said water power, and appurtenant rights, which are the same granted and defined in the deed from George Osman and wife and Salem W. Richardson and wife to Thomas Wells, dated September 17, 1866, and recorded in the office of register of deeds of said Marquette county October 1, 1866, in volume 9 of deeds, on page 68, through which deed plaintiff derived his title, is hereby declared and established.

"2. That the defendants, *Charles T. Dahlke, Edward J.*

Dahlke, Gustav E. Dahlke, the *Neshkoro Milling Company,* a corporation, and *Neshkoro Light & Power Company,* a corporation, and all persons claiming under them, or any or



either of them, subsequent to the filing of the notice of the pendency of this action, to wit, February 7, 1911, be and they are and each of them is hereby forever barred from any and all claims of right or title to the said premises or to said ease-

ment or right to draw or use said water or lien thereon, or any part thereof.

"3. That the width of Mill street in front of said mill lots 6 and 7 be and is hereby established at 49½ feet, excepting east of the point where the north line of said street deflects southward to connect with the south line.

"4. That plaintiff is owner of an easement consisting of a right to tap the hydraulic canal and pond described in said complaint and findings, for the purpose of drawing the water to which he is entitled as herein adjudged, and to draw said water to any part of said mill lots 6 and 7 and there use the same, and to construct and maintain all necessary aqueducts or other devices for such purpose in and across Mill street and the land between said Mill street and said canal and pond.

"5. (a) That the nuisance described in said complaint and findings, to wit, the new electric power house and its additions and foundations, together with the water-wheels, dynamos, shafting, machinery, appliances, and structures connected with or appurtenant thereto, so far as the same are within the limits of said Mill street, be abated and removed by the said defendants from the limits of Mill street as herein established on or before May 18, 1912.

"(b) That in the event said defendants neglect or refuse to abate said nuisance before May 18, 1912, that a warrant do issue to the sheriff of Marquette county, Wisconsin, out of this court, under the seal thereof, commanding said sheriff to abate and remove said nuisance at the expense of said defendants, in the following manner, to wit, by wholly razing and removing said building, together with the water-wheels, dynamos, shafting, machinery and appliances, and other structures connected with or appurtenant thereto from within the limits of said Mill street, and that in case such warrant be issued and executed, the said sheriff collect his own fees and charges and all of the expenses of such abatement and removal of and from the said defendants in the manner provided by law, or

"(c) That upon the neglect or refusal of the defendants to abate and remove said nuisance as aforesaid or to otherwise comply with this judgment, upon filing an affidavit showing such neglect or refusal, the plaintiff may apply to the court

for an order for the enforcement of the same in such manner as to the court may seem proper.

"6. That plaintiff have leave to bring and maintain another action to recover the damages which he has suffered by reason of the shortening of the hydraulic canal and relocation of the gates and other changes in the premises subsequent to the flood of 1905.

"7. That the plaintiff, *W. O. Childs,* do have and recover of and from defendants, *Charles T. Dahlke, Edward J. Dahlke, Gustav E. Dahlke,* the *Neshkoro Milling Company,* and *Neshkoro Light & Power Company,* the costs and disbursements of this action, taxed and allowed at the sum of $320.18 (three hundred twenty and 18/100) dollars.

"Dated December 8, A. D. 1911.

"By the Court, A. H. Reid, Judge."

From this judgment plaintiff appealed to this court.

John J. Wood, Jr., attorney, and *B. R. Goggins,* of counsel, for the appellant.

For the respondents there was a brief by *E. F. Kileen* and *D. W. McNamara,* and oral argument by *Mr. McNamara.*

Kerwin, J. The first, second, third, and fourth assignments of error may be treated together, since they involve the controversy over the width of Mill street, and whether the fee in the plaintiff's lots 6 and 7 extends to the hydraulic canal, so called on the plat.

It is established by the findings and the evidence that the plaintiff is and was before the commencement of this action the owner of lots 6 and 7 fronting on Mill street, together with 150 inches of water to be drawn from the mill-pond at any point on the lots aforesaid under a head of ten feet, the water to be measured at the conductor where it issues onto the wheel or wheels; that the deed through which plaintiff claims title provides that the parties of the first part are to keep up and maintain and keep in repair the dam at said mill-pond, except when the necessity for such repairs is occasioned by the carelessness of the said party of the second

part, in which latter case the said party of the second part is to make the necessary repairs, and in all cases the said repairs are to be made without delay; that a dam was constructed by legislative authority on White river in 1851 and a plat made and recorded in 1852 covering the property in question, which shows Mill street north of plaintiff's lots and south of the hydraulic canal; that there was a head of ten feet of water on the dam before the hydraulic canal was constructed; that, by reason of their ownership of the dam and several conveyances through which they took title and mesne conveyances upon which plaintiff took title, the defendants are under obligation to maintain a dam and power substantially as it was when their grantor, Thomas Wells, took title in 1866; that the surface of mill lots 1, 2, 3, 4, 5, and 6 and part of 7 adjacent to the dam and Mill street was about the elevation of the surface of the dam and Mill street; that the old bed of White river, extending easterly from the dam, was some ten feet lower than the crest of the dam, and the water for hydraulic purposes for use on said lots could only be drawn from the pond; that the dam and Mill street on top of said dam extended from near the northwest corner of mill lot 1 across the valley of White river in a semi-circular course northeasterly and easterly to about State street, thence Mill street continued easterly to its end throughout its whole width on the natural surface of the ground, which sustained an elevation of some ten or twelve feet above the ordinary surface of the water in the river in a state of nature; that on the plat at a point opposite mill lots 3 and 4 on Mill street west of State street appear the words and figures "49½ wide;" that Mill street is a public highway throughout its entire length; that plaintiff owns an easement or right of way in lands to the north of mill lots 6 and 7 to the canal to conduct from said canal to any place on said lots the water power owned by him.

The court also found that in 1855 H. G. Otis Childs and

Sylvester Craig, by conveyances from the owner, became the owners in fee of mill lot 5, together with 100 inches of water to be drawn from the pond, which afterwards became the property of Felix Dombrowski, and that said 100 inches of water power is a first call on said water power, and that the plaintiff's 150 inches is the second call on said water power; that through due mesne conveyances from the original owner, Helen M. White, who made and recorded the plat, the defendant *Neshkoro Milling Company* became the owner of mill lot 1 in block E and mill lots 2, 3, and 4, together with the remainder of the water power; that the dam was constructed prior to the making of the plat; that the hydraulic canal delineated on the plat had not been constructed at the time the plat was made, but the water of the pond extended in a depression on the north side of Mill street to a point about a rod east of the east line of State street; that at the time of platting, Mill street had a water boundary on the westerly and northerly side from near the northwest corner of mill lot 1 to a point a trifle east of the east line of State street, but no water boundary east of that point, although such boundary was delineated on the plat; that Mill street as dedicated was 49½ feet wide at all points except the east end, and the facts proved failed to show any dedication of any additional strip widening Mill street east of State street beyond the width of 49½ feet, and that the hydraulic canal was constructed with its south line east of State street to the angle opposite lot 6 some sixty-six feet north of the south line of Mill street; that Helen M. White in making the plat intended that Mill street should be 49½ feet wide throughout its course, excepting the wedge part at the easterly end, and intended to construct the canal upon her own land along the north side of that street; that the title of the owners of lots 6 and 7 extends to the center of Mill street of the width before stated and no farther, except the easement to tap the canal and conduct therefrom the 150 inches of water appurtenant to said lots; that mill

lots 2 and 7 inclusive have no natural northern riparian boundary, and no riparian rights were naturally appurtenant thereto on the north side thereof.

The foregoing findings, or some of them, are attacked by appellant as not supported by the evidence, and especially it is insisted that Mill street is more than 49½ feet wide and extends to the hydraulic canal, and the title in fee to plaintiff's lots extends to the canal. We think the finding that Mill street was not intended by the proprietor of the plat to extend to the south line of the hydraulic canal is well supported by the evidence. The figures on Mill street "49½ wide" are significant on this point. The fact that the evidence and findings show that while the whole space between lots 5, 6, and 7 and the south line of the canal was used by proprietors of the lots to some extent, it appears the travel by the public generally was upon the 49½-foot strip along lots 5, 6, and 7. Moreover, it is quite apparent from the established facts that the canal was intended to be and was constructed wholly upon the land of the proprietor of the plat through whom plaintiff claims. Other findings heretofore recited and supported by the evidence show that it was not the intention of the platter that Mill street should extend to the hydraulic canal.

Nor is it necessary to consider whether White river or the hydraulic canal is navigable, because in our view of the case the question is wholly immaterial. Mill street opposite lots 6 and 7 not extending to the canal, the fee in such lots stops at the center of Mill street. Of course, since the plaintiff's lots did not extend to the hydraulic canal, they could not under any circumstances have riparian privileges upon the canal even if navigable, therefore there is no question of riparian rights in the case.

Counsel for appellant rely upon *Smith v. C., M. & St. P. R. Co.* 83 Wis. 271, 50 N. W. 497, 53 N. W. 550; *Mariner v. Schulte,* 13 Wis. 692; *Smith v. Ford,* 48 Wis. 115, 2 N. W. 134, 4 N. W. 462; *Brown v. Baraboo,* 98 Wis. 273, 74 N.

W. 223; *Waite v. May,* 48 Minn. 453, 51 N. W. 471. An examination of these cases convinces us that they do not rule the situation here.

But it is further insisted under the fifth and sixth assignments of error that if it be held that the plaintiff's title extends only to the center of Mill street with an easement in the north half of Mill street and the land between the hydraulic canal and Mill street to reach the water power, the judgment is, nevertheless, wrong in limiting the plaintiff's right to reach the canal and obtain water effectively. True, the defendants are bound to maintain the dam and water power and furnish the plaintiff on his lots with the 150 inches of water called for in the deed, but they have a right as owners of the water power and the land upon which it is maintained to use such property for their own benefit, though not in such manner as to impair the plaintiff's use of his 150 inches of water which he has a right to use upon his lots 6 and 7 under a ten-foot head.

The court below found upon sufficient evidence that in the fall of 1866 plaintiff's grantor, Thomas Wells, who then owned mill lots 6 and 7 and appurtenant 150 inches of water, built upon said lots a woolen mill and connected the same with the canal at a point about three feet east of the west line of lot 6 extended north, by means of a conductor or aqueduct in and across the street, through which he conducted water for water power to operate his mill continuously for more than twenty years; that about 1884 said Thomas Wells built a sawmill addition to said woolen mill on the north side thereof and wholly within the limits of Mill street; that the west line of said woolen mill and sawmill was located about two feet east of the waste-gates in the canal as the same were prior to the flood of 1905; that the evidence lays no foundation for any claim of title by adverse possession either as against the public or defendants to any lands lying north of the center of Mill street; that in June, 1905, there was a

flood in White river such as to wash out the gates and the south bank of said canal and the ground of Mill street east of State street between mill lots 6 and 7 and the canal to some extent; that in 1905, after the flood, the defendants *Dahlke,* the town of Neshkoro aiding, reconstructed said canal, partially filling in State street, and locating the south line of the canal a few feet north of its former south line and locating the waste-gates therein about thirty feet westerly of their former location; that no change in the south line of the canal or the north line of Mill street was made until after the flood and washout in 1905; that in the beginning of the year 1908 the defendants *Dahlke* and the *Neshkoro Milling Company* constructed a new electric power house on the south side of the canal and between it and plaintiff's premises, and later constructed an addition thereto to the westerly; that from State street to the waste-gates the south line of the canal is supported by a stone and cement retaining wall and there is no way to connect plaintiff's mill lots with the canal except by putting a water conductor upon some part of lot 5 or penetrating the foundations of the new power house, and no way to obtain water otherwise for power on mill lots 6 and 7 than the tapping of the wooden bulkhead at the end of said power house in which are located the water-wheels of the defendants; that said water power appurtenant to mill lots 6 and 7 may not be quite so readily obtainable under present circumstances as formerly, but it would require only a greater length of conduit and an unimportant additional expense to tap the canal; that to compel defendants to reconstruct the new waste-gates and canal would be a great expense, entirely out of proportion to any advantage thereby brought to plaintiff; that all surveys show that the south line of the canal from the bridge on State street to the new power plant is now more than 49½ feet north of the north line of mill lots 5 and 6, and the same evidence shows that the major portion of the new power plant is located within the street, and that the north-

east corner of said new power plant is approximately three feet north of the north boundary line of Mill street; that said new power house is an obstruction to Mill street and a nuisance thereon and excludes plaintiff from access to the canal and obstructs his right of way for a conductor, and obstructs his approach to that part of lots 6 and 7 owned by him, and that said new power plant is a public nuisance which does the plaintiff special damage; that said new power plant also obstructs the drawing from the canal of 150 inches of water to lots 6 and 7; that if said power plant should be continuously maintained as located it would materially reduce the value of plaintiff's property, and plaintiff has sustained and would sustain in the future damages differing not merely in degree but in kind from the damages sustained by the general public.

The contention of the appellant under this head is that defendants are bound to maintain the dam and power substantially as it was when Thomas Wells, grantor of plaintiff, took title in September, 1866; and that upon the established facts the plaintiff's right to his water power has been obstructed and substantially interfered with, and that the abatement of the new power plant should not have been limited to such part as encroaches upon Mill street; that plaintiff should not be required to leave his own land to tap the mill-pond or the bulkhead, and that full restoration of the canal and water power to its former condition should have been adjudged.

The court below substantially and correctly settled the rights of the parties by the judgment, except that it failed to award damages for the expense of making proper connections with the hydraulic canal in order to reimburse the plaintiff for the extra expense occasioned by the change in the hydraulic canal and the obstructions placed between plaintiff's lots and the canal, or to provide in the judgment that defendants make the proper changes, connections, and constructions at their own expense and maintain the same according to the terms of the deed through which plaintiff claims title.

The plaintiff is entitled to no other restoration and no further damages. It is thought best, however, to provide in the judgment that the defendants make the proper changes so as to furnish and deliver the 150 inches of water owned by plaintiff.

The case is therefore remanded with directions to modify the judgment by requiring the defendants to make the proper changes, constructions, and connections in the canal, water power, and land between lots 6 and 7 and the canal so as to effectively deliver 150 inches of water, drawn from the canal or pond under a ten-foot head, on the north line of said lots 6 and 7 at such point as may be ordered by the court according to the terms of the deed through which plaintiff derives title, within such reasonable time as may be fixed by the court, and, if necessary, further evidence may be taken in order to enable the court to make the proper modification as indicated herein. That the sixth paragraph of the judgment providing that plaintiff have leave to bring and maintain another action to recover the damages he has suffered by the shortening of the canal and relocation of the gates and other changes in the premises subsequent to the flood of 1905 be omitted from the judgment.

By the Court.—The judgment of the court below is ordered modified as indicated in this opinion, and the cause remanded for further proceedings accordingly, the appellant to recover costs in this court, except that the costs for printing be limited to $50.

DOHR, Respondent, vs. WOLFGANG, imp., Appellant.

October 10—October 29, 1912.

Public lands: Homestead entry: Relinquishment: Improvements: Contracts: Validity: Public policy: Consideration: Statute of frauds: Sale of interest in land.

1. **A contract by which a homesteader agrees, in consideration of a certain sum to be paid to him, to relinquish his homestead entry to the United States and surrender possession of the land, so that another may enter and acquire title under the homestead laws and incidentally obtain the benefit of improvements which have been made, is not contrary to public policy and is valid.**
2. **The promise to pay, in such a case, is based upon a sufficient consideration moving from the homesteader, whether, after he has relinquished his entry, the promisor secures the homestead or not.**
3. **Such a contract is not one for the sale of land or of any interest therein, and is therefore not within the statute of frauds (sec. 2304, Stats. 1898).**

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted upon the brief of *W. H. Frawley & T. F. Frawley.* They cited, among other cases, 32 Cyc. 857, 1067; *Love v. Flahive,* 205 U. S. 195, 27 Sup. Ct. 486; *Duncan v. Hall,* 9 Ala. 128; *Welborne v. Spears,* 32 Miss. 188; *Lipsky v. Bergmann,* 52 Wis. 256, 9 N. W. 158; *Kimball v. Adams,* 52 Wis. 554, 9 N. W. 170; *Baringer v. Evenson,* 127 Wis. 36, 106 N. W. 801; *Pacific L. S. Co. v. Gentry,* 38 Oreg. 275, 61 Pac. 423; *Sauerhering v. Rueping,* 137 Wis. 407, 413, 119 N. W. 184.

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

BARNES, J. The plaintiff sued to recover the sum of $300, which he alleged the defendant owed him on an oral contract. Plaintiff claimed that the defendant desired to have one of

his sons secure title to certain land which plaintiff entered as a homestead in July, 1902, under the homestead laws of the United States, and agreed to pay the plaintiff the above named sum if he would relinquish his right to such homestead so that defendant's son might make the necessary application to enter the land as a homestead; that plaintiff accepted such offer and did relinquish and surrender possession of the homestead and one of the defendant's sons attempted at least to enter the land as a homestead. The attempted entry by defendant's son was made immediately after the plaintiff filed his relinquishment at the land office. The defendant denied making the contract. The disputed issues of fact were all found in plaintiff's favor by the jury on sufficient evidence, and defendant appeals from a judgment entered on the verdict.

The appellant assigns four errors: (1) the alleged contract was void because contrary to public policy; (2) there was no sufficient consideration to support the contract; (3) the contract was void under the statute of frauds; and (4) the court should have submitted certain questions to the jury propounded by the defendant.

1. On the first point it is urged that a homesteader cannot sell his homestead before final proofs are made and a receiver's receipt is issued, and that in the event of a relinquishment the improvements belong to the United States, and that the contract was one that either contemplated the sale of an interest in the land or of the improvements made thereon and that it is against the policy of the law to sanction such an agreement.

While there was some loose talk between the parties about selling the homestead and selling the relinquishment, the evidence was ample to warrant the jury in finding that what the plaintiff agreed to do was to relinquish his homestead entry to the United States and surrender up the possession thereof and the improvements thereon. This would enable the defend-

ant's son to enter the land under the homestead laws and acquire title thereto on compliance with such laws, and give him the benefit of all improvements made on the homestead by the plaintiff. There was a valid consideration for such a contract, whether defendant or his son secured the homestead or not. Consideration may consist of a benefit to the promisor or an injury to the promisee. *Messenger v. Miller,* 2 Pin. 60; *Eycleshimer v. Van Antwerp,* 13 Wis. 546; *Hewett v. Currier,* 63 Wis. 386, 23 N. W. 884. By performing his part of the contract plaintiff surrendered up the possession of the homestead and the improvements he had placed thereon, as well as his inchoate right to eventually acquire title to the land by complying with the homestead laws.

Obviously the plaintiff did not attempt to sell or convey the homestead itself. He had a perfect right to relinquish his homestead entry. Act of Congress of May 14, 1880 (21 U. S. Stats. at Large, 140, ch. 89, 6 Fed. Ann. Stats. 300); *Love v. Flahive,* 205 U. S. 195, 202, 27 Sup. Ct. 486. Our attention has not been called to any case holding that such an agreement as the one under consideration is in contravention of public policy. There are a number of cases which hold such a sale to be valid and which also recognize the right of the homesteader to sell certain kinds of improvements. *Lindersmith v. Schwiso,* 17 Minn. 26; *Paxton C. Co. v. First Nat. Bank,* 21 Neb. 621, 33 N. W. 271; and *Tarrance v. Hatfield,* 71 Ala. 234. *Moore v. McIntosh,* 6 Kan. 39; *Hooker v. McIntosh,* 76 Miss. 693; and *Coleman v. Allen,* 5 Mo. App. 127 (affirmed 75 Mo. 332), so hold. Under these cases we hold the contract here made was valid.

2. It is further urged that there was no consideration for the promise to pay because the testimony showed that it was not made until June 28, 1909, whereas the relinquishment was filed in the land office on June 16th, so that plaintiff had nothing to give in return for the promise when it was made.

Plaintiff did testify that according to his recollection the

contract was made on June 28th, and so did Attorney Bradford, who drew the relinquishment. We think it is quite obvious that the witnesses were mistaken as to the date on which the transaction took place. Plaintiff's evidence is to the effect that they dickered about the price and finally reached an agreement, and that thereupon he executed a relinquishment and went to the land office at Wausau to file it, and that defendant's son accompanied him for the purpose of making an entry as soon as the relinquishment was filed. The jury found that plaintiff filed his relinquishment in reliance on the defendant's promise to pay the sum of $300, and the evidence sustains the finding.

3. It is urged that the contract was void under sec. 2304, Stats. (1898), which provides that every contract for the sale of lands or of any interest therein shall be void unless the contract or some note or memorandum thereof expressing the consideration be in writing. It is sufficient to say in answer to this contention that the contract did not contemplate the sale of any land or of any interest therein.

It is further said that the contract was void under subd. 2 of sec. 2307, Stats. (1898), because the promise was not in writing and was one to answer for the debt, default, or miscarriage of another. The jury found that the debt was that of the defendant. Such finding is supported by the evidence.

4. Complaint is made because of the failure of the court to submit certain questions to the jury as requested by the defendant. The verdict as submitted sufficiently covered the issues in the case.

By the Court.—Judgment affirmed.

GRAVES, Administrator, Respondent, vs. RIB LAKE LUMBER COMPANY, Appellant.

October 10—October 29, 1912.

Master and servant: Death caused by unguarded belt and pulley: Duty to guard: Practicability: Evidence: Competency: Cross-examination.

1. In an action to recover for the death of an employee in defendant's sawmill, the evidence is *held* to sustain findings by the jury that the deceased was injured by coming in contact with a pulley and belt which he was engaged in shifting, and that it was practical to securely guard said belt and pulley.
2. A question asked of a witness for defendant as to what the practice was among "reasonably careful" millmen as to guarding of such a shaft and pulley, was incompetent, because it left the witness to decide what millmen were "reasonably careful." If proper at all, the question should have been as to the practice among sawmill men generally, or the great mass of sawmill men.
3. Where on his direct examination a witness was asked only whether it was practical to guard such a shaft and belt without impairing its efficiency, a ruling excluding on his cross-examination the question whether he knew of any mill in Wisconsin where a similar shaft and pulley was guarded was, though somewhat technical, strictly correct.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

This is an action to recover for the death of one Farrington, an employee of the defendant in its sawmill, who was killed while at work in the mill. The negligence claimed was failure to comply with the statute requiring the guarding or fencing of a certain large belt and pulley, alleged to be dangerous to employees in the performance of their duties. The deceased was a millwright, and at the time of his death he, with two associates, was attempting to shift a large and heavy power belt from a live pulley to a dead pulley. The belt furnished the power to run a slab machine, called the "hog," and

it was necessary to throw off this belt while in motion. The pulley and shaft on which it ran were elevated from the floor and were near the ceiling of the room, the pulley was twenty-five inches in diameter, and the belt eighteen inches wide. In order to shift the pulley an employee was obliged to go up a short ladder to a platform running parallel with and near the shaft, take a long stick and reach over the top of the belt near the pulley, insert the lower end of the stick behind a cleat and pull the stick towards himself, thus pulling the belt also towards himself and onto the dead pulley. At the time of the accident Farrington took the stick (which was kept on the floor of the mill) and went up the ladder, while his two associates in the operation, Mock and Bangle, stayed on the floor of the mill to release a heavy tightener for the purpose of loosening the belt. While the two last named were lifting the tightener they heard a noise and turned around. They found deceased upon the floor with a large gash in his right temple. He lived about half an hour, but never spoke. The stick was afterwards found in its place behind the cleat ready to pull the belt off. The jury returned the following special verdict:

"(1) Was John Farrington injured by coming in contact with the belt, pulley and shaft, or with any of said appliances? *A.* Yes.

"(2) If you answer question No. 1 'Yes,' then with which of said appliances did he so come in contact? *A.* Belt and pulley.

"(3) If you answer question No. 1 'Yes,' then was the said machinery with which the said John Farrington came in contact at the time of his injury so located as to be dangerous to employees of the defendant when in the discharge of their duty while using ordinary care? *A.* Yes.

"(4) If you answer question No. 3 'Yes,' then was the failure of the defendant to securely guard or fence said machinery the proximate cause of the injury to said Farrington? *A.* Yes.

"(5) If you answer question No. 1 'Yes,' then did the defendant fail to exercise ordinary care in failing to securely guard or fence said machinery? *A.* Yes.

"(6) If you answer question No. 5 'Yes,' then was the failure of the defendant to exercise ordinary care the proximate cause of the injury to said Farrington? *A.* Yes.

"(7) Was it practical in the efficient operation of said mill to securely guard or fence said belt and pulley? *A.* Yes.

"(8) If you answer question No. 7 'Yes,' then would such guard or fence have lessened the danger, if any, to the said Farrington in the performance of his duties? *A.* Yes.

"(9) Did any want of ordinary care on the part of said Farrington proximately contribute to his injury? *A.* No.

"(10) If the court should determine that the plaintiff is entitled to judgment on this verdict, at what sum do you assess plaintiff's damages? *A.* $5,000."

From judgment in accordance with the verdict defendant appeals.

For the appellant there was a brief by *McFarland & Murat,* and oral argument by *C. D. McFarland.*

D. D. Conway, attorney, and *P. H. Martin,* of counsel, for the respondent.

WINSLOW, C. J. The contention that the manner of Farrington's death rests purely in conjecture cannot be sustained; in fact, it seems that it would be impossible to arrive at any conclusion except that he came in contact with the belt and pulley, as found by the jury. The contention that it is demonstrated by the evidence that it was not feasible or practically possible to fence or guard the belt and pulley is equally untenable. The device for shifting the belt was certainly crude and would necessitate a somewhat cumbrous fence, but the testimony was ample that a fence with an opening through which the arm could be put was entirely practicable and would have obviated the danger of any such accident.

Two rulings on testimony are complained of and will be

noticed. One Ehrman, a witness for defendant, was asked what the practice was among "reasonably careful" millmen as to the guarding of such a shaft and pulley, and objection to the question was sustained. The ruling was right. Conceding, but not deciding, that the question was otherwise unobjectionable, it was clearly incompetent, because it left the witness to decide what millmen were "reasonably careful" millmen, and this was not the proper province of the witness. The question (if proper at all) was, what the practice was among sawmill men generally, or the great mass of sawmill men, with regard to the fencing of such belts and pulleys, and this question was allowed to be asked and answered by the witness at a later period in his examination.

A witness for the plaintiff was asked on direct examination whether it was practical to guard such a shaft and belt without impairing its efficiency, and was not examined on any other subject. Upon cross-examination he was asked whether he knew of any mill in Wisconsin where a similar shaft and pulley was guarded, and an objection to the question as not proper cross-examination was sustained. This ruling is assigned as error, but, though somewhat technical in its enforcement of the general rule which limits cross-examination to matters gone into on the direct examination, it seems to be strictly correct. No other contentions require treatment.

By the Court.—Judgment affirmed.

VOTE-BERGER COMPANY, Appellant, vs. CARTER-WABENO TELEPHONE COMPANY, Respondent.

October 10—October 29, 1912.

Bills and notes: Payment: Findings of fact: Evidence.

A finding by the trial court that a promissory note, which had been returned to the maker marked "paid," had in fact been paid, is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover on a promissory note which, by inadvertence, as alleged, had been canceled and returned to the maker as paid, contrary to the facts. The defendant, by answer, insisted that the note was duly paid and canceled according to a memorandum thereon.

The evidence was to the effect that the note was given by defendant December 1, 1908, and returned to the maker March 12, 1909. The memorandum on the paper was as follows: "Paid. *Vote-Berger Company* by C. S. Boley." Mr. Boley was the bookkeeper, cashier, and auditor for plaintiff and possessed authority to receive payment on the note and cancel it. He returned it by mail, with a letter calling attention thereto, as canceled. There was conflicting testimony, independent of the circumstances aforesaid, respecting payment of the note.

The trial was by the court and resulted in findings in favor of defendant. Judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *Mills Tourtellotte* and *W. A. Wescott,* and for the respondent on that of *John F. Hooper.*

MARSHALL, J. The sole complaint by appellant is that the findings are not warranted by the evidence. The case is pre-

sented in anticipation of this court carefully weighing such evidence and noting, efficiently, preponderating weight without regard to the persuasive effect of the trial opinion. This court has no very nicely balanced scale with which to weigh evidence. Such are afforded only in trial jurisdictions. It follows that great weight in favor of findings of fact made there must be accorded thereto and reasonable doubts resolved in favor thereof. Unless the evidence so strongly preponderates against the same as to indicate, clearly, that they are wrong notwithstanding the presumption in their favor, they cannot be disturbed. Tested thereby, we are constrained to hold that the findings here give the correct state of the case.

By the Court.—Judgment affirmed.

Corry, Appellant, vs. Scudder and wife, Respondents.

October 10—October 29, 1912.

Tax titles: Description of land: Certainty: Extrinsic evidence.

1. Descriptions of land in tax proceedings must be given the same effect as descriptions in ordinary conveyances between grantor and grantee, and if they indicate the land intended with ordinary and reasonable certainty they may be aided in their application to specified property by reference to extrinsic facts and circumstances.
2. Thus, a tax certificate describing the land sold as all of a certain city lot except the part owned by a person named, is not void for uncertainty; and the exact boundaries of the part owned by said person may be shown by extrinsic evidence.

Appeal from an order of the circuit court for Florence county: John Goodland, Circuit Judge. *Reversed.*

The amended complaint sets forth facts of four alleged causes of action, each based upon a tax certificate covering the same piece of ground, described in the first paragraph of the complaint as "Lot one (1) of H. Bentley's 3rd Addition to

the village (now city) of Marinette," except a part thereof, which is alleged to be described by the metes and bounds stated in the complaint.

The descriptions in the several certificates are as follows: "All of Lot 1, H. Bentley's 3rd Add. to City of Mar., ex. pt. owned by B. F. Simpson, now W. B. Quinlan;" "Lot 1, H. Bentley's 3rd Add. to Vil. of Marinette (part not owned by B. F. Simpson);" "All of Lot 1, except part owned by W. B. Quinlan, H. Bentley's 3rd Add.;" "All of Lot 1, H. Bentley's 3rd Add., except part owned by W. B. Quinlan." The identity of the land described in the several certificates, the facts regarding the ownership of the part excepted, and the ownership of the balance by the defendants, and the facts regarding notice to the defendants that the certificates were outstanding and about to outlaw, that a demand had been made that the defendants redeem or purchase them, and notice, in case of refusal, that the plaintiff would commence foreclosure proceedings, and the defendants' refusal, are alleged. The plaintiff demands judgment for the amounts due him under these certificates, with expense of sale and interest, and judgment of foreclosure and sale of the defendants' interest in such parts of the land as may be required to be sold to satisfy the demand.

The defendants demurred to the complaint upon the ground that it appears on the face thereof (1) that several causes of action have been improperly united; (2) that sufficient facts are not stated therein to constitute a cause of action.

This is an appeal from the order of the court sustaining the demurrer to the complaint.

For the appellant there were briefs by *Sanborn, Lamoreux & Pray,* and oral argument by *A. T. Pray.*

Henry T. Scudder, for the respondents.

SIEBECKER, J. The complaint sufficiently alleges that the plaintiff is the owner of the several alleged tax certificates and

that they are on the same tract of land. These allegations, if the allegations are sufficient in other respects, authorize her to include in one action of foreclosure of them all the certificates she holds upon the same tract of land. Sec. 1181, Stats. (Supp. 1906: Laws of 1899, ch. 337). This is sufficient to negative the first ground of demurrer, namely, that several causes of action have been improperly united in one complaint.

The ground of demurrer urged in defendants' behalf, and before this court, is that each of the several alleged causes of action in the complaint fails to state facts sufficient to constitute a cause of action. This is based on the claim that all the tax certificates, on which plaintiff rests her claim, fail to describe any land with sufficient definiteness to give the plaintiff as holder of such certificates a lien on the land. The several descriptions are copied into the foregoing statement. From a comparison of them it will be observed that they all refer to "Lot 1, H. Bentley's 3rd Add." to Marinette, and that the tax sales all pertained to this lot and embraced all of it "ex. pt. owned by B. F. Simpson, now W. B. Quinlan," "part not owned by B. F. Simpson," or "except part owned by W. B. Quinlan." No point is raised as to the sufficiency of the complaint under this ground of demurrer, aside from the one that the descriptions of the alleged parcel of land are so defective that they fail to describe any land. Sec. 1047, Stats. (1898), provides:

"In all assessment and tax rolls, and in all advertisements, certificates, papers, conveyances or proceedings for the assessment and collection of taxes, and proceedings founded thereon, . . . any descriptions of land which shall indicate the land intended with ordinary and reasonable certainty and which would be sufficient between grantor and grantee in an ordinary conveyance shall be sufficient."

This statute has been applied in numerous cases, wherein it is held that descriptions in tax proceedings must be given the same effect as descriptions in ordinary conveyances be-

tween grantor and grantee, and if the descriptions indicate the land intended with ordinary and reasonable certainty they may be aided in their application to specified property by reference to extrinsic facts and circumstances.

"Where the language in the description of the land conveyed, or excepted from the conveyance, is otherwise doubtful, a practical location by the agreement, acts, conduct, or declarations of the parties concerned, followed by adverse and exclusive possession, is sufficient to remove the doubt and give certainty to the description." *Meade v. Gilfoyle,* 64 Wis. 18, 24 N. W. 413.

"This is on the theory that the law will not declare a description void for uncertainty when the light which contemporaneous facts and circumstances furnish renders it definite and certain." *Murphy v. Hall,* 68 Wis. 202, 31 N. W. 754. In this last case a description, "Part 5 of lot 4 of section 20, town 28 north, of range 22 east," without reference to any record, plat, or description, or other extrinsic evidence to enable a court to ascertain the property, was held void for uncertainty. This was necessarily the result, since nothing in the description could be referred to by which the land could be ascertained. In *N. Boyington Co. v. Southwick,* 120 Wis. 184, 97 N. W. 903, the assessment roll described the part excepted from lot 7 as "a piece 10 ft. by 25 ft. out of the southwest corner." This was assailed as void for indefiniteness and uncertainty, but the court held:

"The uncertainty as to the parcel excepted could easily be made certain by reference to the Prentice deed, or by inference from contemporaneous conditions, such as the occupancy by Prentice of a particular piece answering the description."

In *Scheiber v. Kaehler,* 49 Wis. 291, 5 N. W. 817, a tax deed was assailed as void for indefiniteness in description of the land, which was described as "one quarter-acre ($\frac{1}{4}$) in the south half of northeast quarter, bounded north, west and south by H. Krohn's land, east by milldam and Cedar creek,"

in section 9, etc. As to the sufficiency of this description in the tax deed the court observed:

"It is not an uncertain description, unless it should appear upon investigation that Krohn did not have any land in that south half of the northeast quarter, which bounded a quarter-acre not owned by him, on the north, west and south, and which was bounded east by the creek and dam; but if, upon investigation, a quarter-acre should be found so bounded, and not owned by Krohn, then the quarter-acre would be located, and the description made perfect."

It will be observed that to make this description certain resort was had to extrinsic evidence to ascertain the land owned by Krohn and the boundaries and location of the land embraced in this deed. From these adjudications it is manifest that the statute has been liberally construed and a wide latitude has been allowed in its application, by permitting reference to extrinsic facts to ascertain with definiteness and certainty what land the tax proceedings embraced. The description in the instant case, in the first certificate, refers, properly, to a platted addition to the city and designates and covers all of lot 1, "ex. pt. owned by B. F. Simpson, now W. B. Quinlan." In the *Scheiber Case* the exception referred to lands owned by Krohn, and it was held that a description of land in a tax proceeding which was described as bounded by land owned by a third person does not render the description void on its face for uncertainty, and that a reference to extraneous facts and circumstances, locating the land referred to by land owned by such third person, was proper to make it certain. And so here, if the description can be made certain by such evidence, the portion of lot 1 referred to in the proceeding could be located and the description made definite and certain. The complaint alleges a certain and definitely described piece of land as being the part excepted from lot 1 embraced in the certificate and as lying within fixed lines and metes and bounds. If the evidence on the trial sustains these allegations, then the calls of the statutes

are fully met and satisfied. In the light of the adjudications the facts alleged in the complaint are sufficient to constitute a good cause of action to foreclose each of the tax certificates described therein, and the court erroneously sustained the demurrer to the complaint.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to the trial court to enter an order overruling the demurrer, and for further proceedings according to law.

DEPOW, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

October 11—October 29, 1912.

Railroads: Negligence: Obstructing street crossings: Municipal ordinance construed: Injury to traveler on street at night: Damages: Evidence: Opinions of experts: Excessive award: Appeal: Reversal: When new trial ordered.

1. A municipal ordinance prohibiting railroads from obstructing the streets with their engines or cars, without naming a time limit within which cars may remain upon a crossing, is construed as not having been intended to interfere with the ordinary usual and careful operation of railroad trains, but merely as prohibiting unnecessary stops upon street crossings, or the continuation of a necessary stop for an unreasonable or unnecessary time.
2. Opinions of experts as to whether plaintiff's present physical condition was caused by the injury complained of, and as to the extent of his disability, are not absolutely binding upon the court.
3. In an action for personal injuries, where a judgment for plaintiff is reversed solely upon the ground that the damages awarded are excessive, this court will ordinarily name a smaller sum which the plaintiff may accept and terminate the litigation.
4. But, in an action for injuries sustained through driving a team of horses against a train of cars standing at night on an unlighted railroad crossing, it appearing not only that the award

of $9,500 is much too large, but also that the evidence tending to establish defendant's negligence is very uncertain and unsatisfactory, the judgment is reversed and the cause remanded for a new trial.

Appeal from a judgment of the circuit court for Oconto county: S. D. Hastings, Circuit Judge. *Reversed.*

Edward M. Smart, for the appellant.

For the respondent there was a brief by *Classon & O'Kelliher,* and oral argument by *D. G. Classon.*

Timlin, J. The plaintiff, traveling at night on the street, drove his horses against the side of a train of flat cars standing on a railroad crossing and was thereby injured. He was riding with his wife in a sleigh drawn by a team of horses and going west. There were several railroad tracks on this crossing and switches north and south of the crossing. The crossing was in a depression in the street of three and one-half feet in a distance of 183 feet. A flagman was kept at this crossing in the daytime and an electric light at night. This electric light was maintained by an electric light company by contract with the city and paid for by the railroad company. On the night in question the electric lights in the city of Oconto were out by unavoidable accident. An ordinance of the city of Oconto was introduced in evidence, the first section of which is as follows:

"Section 1. All railroads are hereby prohibited from obstructing the streets of the city of Oconto with their engines or cars, but the standing of cars or engines of a passenger train on the street during the usual and necessary stoppage of the train at a station, shall not be deemed an obstruction within the meaning of this ordinance."

The scope and meaning of this ordinance was not discussed by counsel or explained to the jury. There are no exceptions to the instructions given to the jury and no requests for instructions. But there was a motion to set aside the verdict on the ground of excessive damages, which was denied and

an exception taken. The jury awarded damages in the sum of $9,500. The plaintiff has no visible wounds, bruises, or injuries. He suffers from nervousness, shortness of breath, excessive and irregular heart action, and a tendency to perspiration. It is undisputed that aside from this he possesses a very excellent physique and fine muscular development. It is asserted that he has enlargement of the heart.

The fact that his present condition was caused by the collision with the car standing on the crossing and the extent of his disability rest upon the opinions of experts. Such opinions are not absolutely binding upon the court. *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518. We are satisfied that the damages awarded are at least double what they ought to be on the evidence. Ordinarily this would result in reversing the judgment and naming a sum which the plaintiff may accept and terminate the litigation. *Lehman v. Amsterdam C. Co.* 146 Wis. 213, 131 N. W. 362; *Beach v. Bird & W. L. Co.* 135 Wis. 550, 116 N. W. 245. But in the instant case the evidence tending to establish defendant's negligence is so uncertain and insufficient that we have decided to remand the cause for a new trial on the merits. The usual statute or ordinance relating to the obstruction of the highway crossings by trains fixes a time beyond which the crossing shall not be obstructed, usually five minutes. There is considerable variety of expression, of course, but the nature of the subject almost requires that a time be fixed if the statute or ordinance make any change in what we may call the common law. Under our statutes a railway company has a right to use the street on which its tracks are lawfully laid for legitimate purposes, but it has no right to leave its cars standing upon the street for an unnecessary and unreasonable length of time. *Fay v. M., St. P. & S. S. M. R. Co.* 131 Wis. 639, 111 N. W. 683; *Evans v. C., St. P., M. & O. R. Co.* 86 Wis. 597, 57 N. W. 354; *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 325, 14 N. W. 452; *Janesville v. M. & M. R. Co.* 7 Wis.

484; *Crowley v. C., St. P., M. & O. R. Co.* 122 Wis. 287, 99 N. W. 1016. This is a very general form of statute which fixes the time beyond which the crossing must not be obstructed at five minutes. *Hinchman v. P. M. R. Co.* 136 Mich. 341, 99 N. W. 277; *Comm. v. B., B. & G. R. Co.* 135 Mass. 550; *Ill. Cent. R. Co. v. State,* 71 Miss. 253, 14 South. 459.

It may have been that the jury understood from the ordinance in question that a freight train could not stop upon a crossing at all. The proper construction of the ordinance in question is that the obstruction therein mentioned relates to an unnecessary stop upon a highway crossing or a necessary stop prolonged for an unreasonable or unnecessary length of time. It cannot be presumed that the ordinance was intended to interfere with or prevent the ordinary usual and careful operation of railroad trains. There is no proof in the case that this stop was unnecessary or that it continued for an unreasonable time. The utmost limit of time fixed by the plaintiff's proof is five minutes, although he does say, once or twice, "five or six minutes." The substance of his testimony, however, is to the effect that a certain church is about a quarter of a mile east of this crossing and that he could see the crossing from the time he arrived at that church until he reached the crossing, and that no locomotive passed over it during that time. He drove his horses part of the way on a walk and part of the way on a trot, and estimates that in this way he proceeded at the rate of three miles an hour, or a quarter of a mile in five minutes. The distance of a quarter of a mile is estimated, the rate of speed is estimated, and the time is estimated. The estimate of the rate of speed is very low and conflicts with common experience. On the other hand, the members of the railroad crew testify that the stop was made for the purpose of sending a man ahead to ascertain whether a certain sidetrack upon which they intended to go was clear of cars. To ascertain this the messenger had to travel about 150 feet and return. Some of the

persons in the cab saw the collision and it occurred before this messenger reached his destination and within two minutes from the time the train stopped. So we have on one hand a claim that the train was stopped on the crossing for five minutes, and on the other hand a claim that it was stopped on the crossing for two minutes, and no evidence tending to show that whatever the time was it was unnecessary or unusual or different from the ordinary mode of operating railroad trains. The fact that this crossing was within the switching precinct must be taken into consideration. It may be that ordinary care would require the defendant's employees in charge of the train to notice that the electric light was out at the crossing and to send back one of their number with a lantern to stand on the flat car which was on the highway crossing. But this aspect of the case was not submitted to the jury or tried. The train consisted of a locomotive and tender, a string of flat cars, and a caboose at the end. The operating crew consisted of a fireman, engineer, two brakemen, and a switchman or foreman. The latter was at the rear of the train, the fireman and engineer in the cab, the other brakeman was sent ahead for the purpose mentioned, and the whereabouts of one is not accounted for. The train was pulled across this street crossing so that the rear of the tender was about two car lengths south of the crossing and the third car stood on the crossing. Whether ordinary care would have required the stoppage of the train on the north side of the crossing and sending the brakeman a further distance ahead we cannot say. This aspect of the case was not tried. Much (but not all) would depend upon proof of the usual and ordinary mode of operation under like circumstances. It seems to us clear from the construction of the crossing with reference to the location of switches and sidetracks that it was intended that switching should be carried on over and upon this crossing, and switching cars requires stopping and also back and forward movement.

Nothing that is said in this opinion is to be taken as sug-

gesting that there was or was not in fact negligence on the part of either the plaintiff or defendant, but merely as pointing out the unsatisfactory manner in which the case was tried and giving reasons for the departure from the usual disposition in this court of like cases.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

KIMBALL, Appellant, vs. UNIVERSAL CRUSHED STONE COMPANY, Respondent.

October 11—October 29, 1912.

Master and servant: Injury: Cause of accident: Dangerous conditions: Warning: Nonsuit.

In an action for injury sustained by an employee in defendant's stone-crushing plant through the tipping over of a heavy fly-wheel which he was helping to move, it is *held* that the fall of the wheel could not have been caused, as claimed, by a slight convexity of its thirteen-inch rim and a slight unevenness of the concrete floor on which it stood. Defendant was therefore not negligent in failing to warn plaintiff of those conditions, and a nonsuit was properly granted.

APPEAL from a judgment of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

On March 9, 1910, plaintiff was employed as a laborer by the defendant company. A large steam engine which stood upon a cement foundation in the engine room of defendant's plant was being dismantled and plaintiff was instructed by the superintendent to go to the engine room and assist the other workmen there. A wheel weighing from five to seven tons, which had been detached from the engine and placed in an upright position preparatory to being rolled along the cement floor to an adjoining room, overbalanced and fell upon

the plaintiff. This action is brought to recover damages for personal injuries sustained, the complaint alleging that the surface of the cement floor was uneven and that the face of the wheel was oval, but that owing to the insufficiency of the lighting in the room these facts were not discernible to plaintiff; that plaintiff's assistants in the work were unskilled and ignorant and were unfamiliar with the kind of work to be done, and that plaintiff was without experience in such work and unfamiliar with the proper method of doing it; that sufficient appliances were not furnished, that no directions or instructions were given to plaintiff, and that he was not warned of the dangers incident to the work. The answer was a general denial of the allegations of the complaint. At the close of the testimony the defendant's motion for a nonsuit was granted and judgment entered accordingly. Plaintiff appeals.

Wallace Ingalls, for the appellant.

For the respondent there was a brief by *Simmons & Walker,* and oral argument by *John B. Simmons.*

BARNES, J. The appellant insists that there was evidence tending to show (1) that the room was not well lighted; (2) that the cement floor was not level; (3) that the face of the wheel was convex; (4) that an insufficient force of men was provided to do the work; (5) that the plaintiff's regular and usual place of employment was in another building; and (6) that plaintiff did not know of the unevenness of the floor or of the convexity of the face of the wheel. From these facts appellant argues that the jury might have found that the defendant either knew or ought to have known of the condition of the wheel and the floor and was negligent in failing to warn the plaintiff of the danger of the wheel toppling over because of these conditions, and furthermore that it might have acquitted the plaintiff of contributory negligence and of assumption of risk.

The wheel was ninety inches in diameter and its face was thirteen inches in width. The hub and the rim were connected by eight spokes. After the wheel had been removed from the shaft to which it had been attached, it stood on the floor in an upright position in close proximity to an abutment. It was necessary to move it from the place where it stood in order to roll it along the floor to the opening through which it was to be removed from the room. The workmen "cut" or gouged the wheel back and forth for some time until it was moved out a couple of feet from the abutment and far enough therefrom so that it could be rolled along on the floor. During the "cutting" process the plaintiff stood on the abutment assisting in the work. When the parties were ready to begin rolling the wheel, plaintiff turned his back thereto to step down from the abutment, and before he got out of the way of the wheel it fell over in his direction and injured him. None of the employees who were about the wheel at the time of the accident, aside from the plaintiff, testified in the case.

It is undisputed that the convexity of the wheel was one eighth of an inch. Stated in another way, the center line of the face of the wheel projected one eighth of an inch beyond its outer edges. The wheel in question had been used for driving a belt, and the evidence showed that such wheels are slightly crowned toward the middle of the face, and that there was nothing unusual about the construction of this one. It may well be doubted whether there is any evidence tending to show that the concrete floor was not level, but we will assume the fact to be that it sloped one eighth of an inch to the foot at the place where the wheel stood when it fell over. This is the most that plaintiff claims. The plaintiff testified that when he let go of the wheel to step down from the abutment he was not conscious of exerting any force upon it to hold it in an upright position, and that it was not inclining in his direction so as to require any strength on his part to hold it in position, but that it stood perfectly straight. It is

obvious that not to exceed six and one-half inches of the face of the wheel could rest upon the floor and that in this distance the inclination of the floor was substantially one sixteenth of an inch.

It seems apparent that the accident could not have resulted from the causes which plaintiff assigns, and that there was no causal connection between the failure to warn and the accident, and therefore no negligence in not warning. The law of gravity is immutable, and we think it is impossible that the unevenness of the floor coupled with the convexity of the wheel should so disturb the center of gravity as to cause the wheel to topple over, when considered in connection with the slight momentum which the wheel would have in moving to one side about three sixteenths of an inch. The court was therefore right in not submitting the case to the jury. *Groth v. Thomann,* 110 Wis. 488, 495, 86 N. W. 178; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434; *Badger v. Janesville C. Mills,* 95 Wis. 599, 603, 70 N. W. 687; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352, 77 N. W. 714; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382, 80 N. W. 467; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513; *Flaherty v. Harrison,* 98 Wis. 559, 74 N. W. 360.

If an insufficient number of men were employed, that fact was as apparent to the plaintiff as it was to the defendant, and in any event there was no evidence tending to show that the failure to furnish additional help had anything to do with the accident. There is an additional reason why the plaintiff cannot recover in this case, but it is unnecessary to discuss it.

By the Court.—Judgment affirmed.

ZUWODNICEK, Respondent, vs. HIGGINS SPRING & AXLE COMPANY, Appellant.

October 11—October 29, 1912.

Master and servant: Unsafe working place: Cause of injury: Evidence: Sufficiency.

1. To warrant a recovery in a personal injury action the cause of the injury must not rest in conjecture, but must be established to a reasonable certainty.
2. In an action for an injury to an employee working at a machine for trimming steel springs, caused by a piece of steel striking his eye, the evidence (stated in the opinion) is *held* to sustain findings by the jury to the effect that the piece of steel was caused to be thrown from the floor by the fall, from the framework of said machine, of a heavy knife which had been negligently placed on the machine by defendant's foreman.

APPEAL from a judgment of the municipal court of Racine county: WM. SMIEDING, JR., Judge. *Affirmed.*

Action to recover damages for personal injuries. The defendant owns a machine shop and is engaged in the manufacture of steel springs and axles at the city of Racine. The plaintiff at the time of the injury was about thirty-one years of age, a blacksmith by occupation, and had been in the employ of the defendant, in the capacity of a general workman, for about nine years. On the 11th day of September, 1911, the plaintiff was directed by the defendant to operate a certain machine in its plant known as a "spring trimmer." The machine is an upright iron frame, is equipped with stationary lower, and movable upper, knives, is run by belt power, and is used for cutting iron and steel and shearing and trimming off the ends of metal springs. Its dimensions are thirty-one inches deep, forty-one inches wide, and about thirty inches from the ground to the top of the frame, from which the knife hereinafter referred to is claimed to have fallen. The knife in question was a piece of steel $4\frac{7}{8}$ x $5\frac{1}{8}$ x $1\frac{1}{2}$ inches and weighed seven pounds: the surfaces, one and one-half

inches in width, were practically level, so that the cutting surface of the knife formed nearly a right angle with the perpendicular surfaces. The complaint alleges that while plaintiff was operating this machine,

"a heavy edged tool or knife, designed for use in another trimming machine in said plant, having been taken therefrom for the purpose of being sharpened, and having been theretofore carelessly and negligently placed on the machine which the plaintiff was operating, fell from the said frame of said machine to the floor below, a distance of about two and one-half feet, striking said floor where plaintiff was working, with considerable force, and causing a splinter or piece of steel then and there being upon said floor, to fly with sufficient force to pierce or penetrate the right eye of the plaintiff and destroy the sight thereof; . . . that the machine upon which plaintiff was working was insecurely fastened to the floor, and was loose on the foundation, and while being operated at the time of said injury, and a long time prior thereto, to the knowledge of the defendant, moved back and forth, shook and vibrated; . . . that the floor at the place where said heavy edged tool or knife fell was an uneven brick surface, and at all times was littered with large and fine particles and pieces of steel similar to that which was driven into plaintiff's eye; . . . that said defendant was careless and negligent in placing said heavy edged tool or knife upon the frame of said machine, in view of the fact that said machine was insecurely fastened to the floor, and that such careless and negligent act rendered the place where plaintiff was working unsafe, under the circumstances stated, and that by reason of the alleged carelessness and negligence of the defendant, plaintiff suffered the loss of his right eye."

The answer admitted the formal, but denied the material, allegations of the complaint.

A special verdict was returned finding (1) that plaintiff was injured by being struck in the right eye by a piece of steel or iron caused to be thrown from the floor by the fall of a heavy knife from the framework of the machine at which he was working; (2) that plaintiff had no knowledge of the

knife being on his machine before it fell to the floor; (3) that plaintiff's foreman, Martin Christensen, placed the knife on the framework of plaintiff's machine; (4) that said Martin Christensen was guilty of a want of ordinary care in placing said knife on said machine; (5) that the placing of the knife on said machine was the proximate cause of plaintiff's injury; (6) that plaintiff was not guilty of any want of ordinary care which contributed to produce his injury; and (7) damages, $2,500.

On the coming in of the verdict the usual motions were made by the respective parties, and from a judgment entered in favor of plaintiff on the verdict the defendant appealed.

For the appellant there were briefs by *Lawrence A. Olwell* and *Burr J. Scott,* and oral argument by *Mr. Scott.*

Wallace Ingalls, for the respondent.

Vinje, J. Defendant claims that plaintiff's evidence does not establish an issue for the jury because (1) it fails to show that Christensen, its foreman, placed the knife on the machine and that it fell therefrom; (2) because it would be impossible for the knife to fall from the machine if it was placed thereon; and (3) because it would be impossible for plaintiff to be injured as he was by a flying scrap of iron starting from a place on the ground near the toe of his foot. If plaintiff's case rests in conjecture or in a weight of mere possibilities, then the verdict in his favor cannot be sustained. To warrant a recovery the cause of the injury must be established to a reasonable certainty. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657; *Hart v. Neillsville,* 141 Wis. 3, 123 N. W. 125; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 633; *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142.

Plaintiff's testimony as to how the injury occurred is as follows:

"I was about one and one-half feet away from the machine. I did not measure the distance. As I turned the iron fell to the floor and knocked my eye out. The piece of iron was 5" x 7" and more than an inch thick. It was a knife from the machine like the one I was working on. The foreman brought it from the machine shop. I know because he took them out and went to sharpen them. I know because I saw him loosen and take them out. I saw him coming back from the east toward the machine with them. He was coming between my machine and the bench. He had two knives, one in each hand. *Q*. Now do you know how that knife happened to fall from that machine? *A*. I know that when it fell and knocked my eye out and I saw it lying on the floor. I know it is the knife the foreman had because there are no other kind of knives. Later on I looked it over and it was freshly sharpened. When it fell the foreman was fastening the other knife to the machine. The knife that fell belonged in the other machine, the one the foreman was working on, that is the machine to the north. I did not see the knife on my machine before I was injured. As I turned around it was just falling. There was no one around there at the time except the foreman. . . . The knife that fell to the floor weighed about six or eight pounds. I know that the piece that cut my eye came from the floor because when the knife fell it immediately struck me in the eye. There was no other machine operating in the vicinity. So far as I know it could have come from no other place. The piece of iron fell from the bed of the machine to the floor, a distance of two and one-half feet. . . . My foot was so injured that it pained me frequently for about two weeks. The knife struck me on the very end of the large toe. It fell on the floor as the lower end hit my toe. It fell first on the floor and then on the toe. . . . I did not see the iron strike my toe, but I felt it. That was after it knocked my eye out. When my eye was struck I jumped and was frightened and moved away from the place. I do not know whether the knife fell lengthwise or flat. I do not know whether it hit the ground at the same

time that it hit my foot. If it had struck my foot before it struck the ground, I think it would have cut off my toe. That is the best answer I can make as to whether it hit my foot or the ground first. . . . I did not see this iron as it was falling. When it fell it made a big noise and immediately something struck me in the eye. I heard this iron strike the scrap. It was a very big noise. Something hit me in the eye right away. . . . I saw the knife or die later when it was lying on the floor. I saw it right after I was hit in the eye. It is a fact that both eyes closed immediately and the water was running from both. I wiped my eyes twice right there at the machine. Later on I held a handkerchief over my right eye, and I could see with the other one. At that time I saw the knife. . . . I want to be understood as saying that I stopped to look at the knives. I saw the knife because I was looking at it later on. I just wiped my eye and then I looked at the knife immediately. I did not pick it up, I just looked it over. I saw that it was freshly sharpened."

Christensen, defendant's foreman, testified on behalf of the plaintiff as follows:

"I was on the other side of the machine to the east at the time of the accident. I do not remember whether I had taken the knives out to sharpen them. I will not swear that I did not. I do not remember. It is possible that I did so. . . . These are the only two similar machines in the factory. They are called trimmers. I do not remember that just before the plaintiff was hurt that I was bringing a couple of these knives from the sharpening room. I could not swear that I was not doing so because I do not remember. I do not remember that one of these knives was there on the floor after the plaintiff was injured. I do not remember seeing any knife on the floor. I will not swear that there was not one there. . . . There was nothing to prevent my having seen a knife on the floor, if it had been there, but I did not pay any attention to the floor, and even if it had been there it could be there and I might not notice."

The testimony of the same witness, given in behalf of the defendant, does not materially vary or modify that given in behalf of the plaintiff in so far as it relates to the placing of

the knife on the frame of the machine. Defendant offered no other evidence to show that the knife was not in fact placed on the machine by Christensen at the time of the accident. Upon such testimony it seems clear that the jury was warranted in finding that the knife was placed on the frame of the machine by defendant's foreman. While plaintiff did not see it lying on the frame of the machine, he does testify that he heard it fall, that it struck his toe and injured it, that he saw it lying on the floor immediately after the accident below the frame of the machine, where he claimed it was placed, and if it be true, as the jury had a right to believe, that the knife fell upon the floor, and upon plaintiff's toe, as he testifies, then the only legitimate inference that can be drawn from the testimony is that it fell from the frame of the machine, as the evidence fails to disclose that there was any other place from which it might have fallen and struck plaintiff's toe in view of the position he was in at the time of the injury. Plaintiff testifies that he saw the foreman shortly before the injury with two knives in his hands. The foreman and plaintiff both unite in saying that there were only two machines in the factory having knives similar to this, namely, the one plaintiff was operating and the one the knives of which the foreman was engaged in inserting at the time of the accident. It therefore seems reasonably certain that the knife was placed on the frame of the machine by defendant's foreman and the jury was warranted upon the testimony in so finding.

The next claim is that if the knife was placed on the frame of the machine by defendant's foreman it could not have fallen therefrom. This is based on the testimony given on behalf of the defendant to the effect that there was little or no vibration to the machine when in operation, that tests were made by placing a knife on the frame of the machine in various positions when it was in operation and that it did not fall; that it was also placed just far enough in on the frame

of the machine so that it would lie thereon, but be dislodged by a very slight jar, and that the machine was operated when the knife was so placed, and yet it did not fall. On the part of the plaintiff there is considerable evidence to show that the machine at the time of the accident was not securely fastened to the floor, that it vibrated considerably when in operation, and that it shook more or less from side to side when springs were being trimmed or unusually heavy material was being cut. It is a matter of common knowledge that almost all machines driven by belting and shafting vibrate more or less when in motion. Such fact, taken in connection with the direct testimony produced on behalf of the plaintiff that the machine did vibrate and shake when operated, is sufficient to support the verdict that the knife fell from the machine.

The last point urged by defendant is that it was not possible for a scrap of steel, starting from a position near plaintiff's toe, to strike plaintiff's eye and inflict the injury to which the doctor testified. This is based chiefly upon the theory that if the flying piece of steel started from a place near plaintiff's toe it could not have cut the eye itself without cutting the lids, and plaintiff's eyelids were not injured. Both the cornea and the crystalline lens of plaintiff's right eye were cut. The cut into the crystalline lens was directly opposite the outside cut, so that the cuts in the two membranes were directly back of each other. From this fact it is argued that the piece which struck the eye must have come in a horizontal direction if the plaintiff was looking straight forward or substantially so, and that the only way in which he could have been injured as he was by an object starting from a place near his toe would be by his looking down and forward at an angle of about forty-five degrees. While there is some testimony on behalf of plaintiff to the effect that his head was in a downward and forward position at the time of the injury, yet such testimony is vague and unsatisfactory. It seems, however, as the fact probably was, that plaintiff could not tell accurately just in what direction he was looking at the time he was in-

jured. He may have been looking downward and forward. But if he was not, it cannot be assumed that when a knife such as the one in question struck a steel scrap which may have been slightly curved or of an irregular outline it would fly in a straight direction towards his eye. It is practically impossible to foretell or ascertain the path that such a moving object will take or did take. If set in motion through the air, it may describe a course which is neither a straight line nor a uniform curve of any known description. So that it is possible that plaintiff's eye may have been injured as it was by a scrap of steel starting from a point near his toe even though he was not looking downward and forward. We conclude, therefore, that if plaintiff's evidence is to be believed, and that was a question for the jury, there is nothing conjectural or improbable either in the fact that the knife was placed where it is claimed it was placed by the defendant's foreman, or, if so placed, that it fell from the machine owing to the vibration thereof, or in the manner in which the eye was injured from the scrap of steel flying from near plaintiff's toe, and the judgment must therefore be affirmed.

As this injury happened after the Workingmen's Compensation Act went into effect, the question of the negligence of a fellow-servant is not in the case.

By the Court.—Judgment affirmed.

DONAHUE, Appellant, vs. GUNTER, Respondent.

October 11—October 29, 1912.

Sheriffs: Money deposited under stipulation: Undertaking on appeal: Retention by other party: Preventing filing: Demand.

1. Where money was deposited with the sheriff by a judgment debtor pursuant to a stipulation between the creditor and debtor that it should be applied upon the judgment "in the event of said debtor neglecting and refusing to file" an undertaking on appeal within a certain time, and three days before that time expired a good and sufficient undertaking was served

on the attorney for the creditor and was retained by him for his own convenience until after the time fixed for filing had expired, but was filed by the debtor immediately upon its being returned to him, the creditor cannot be heard to say that the debtor *neglected and refused* to file the undertaking pursuant to the stipulation. *Donahue v. Gunter*, 142 Wis. 465.

2. To put the debtor in default, under such circumstances, the creditor's attorney should have returned the undertaking in reasonable time for filing, even though no demand for such return was made.

3. Even if a demand were necessary in such a case, the fact that on the last day for filing the attorney for the debtor called twice during ordinary business hours at the office of the creditor's attorney for the purpose of getting the undertaking, and found the door locked, would excuse making demand.

Appeal from a judgment of the circuit court for Kenosha county: John K. Parish, Judge. *Reversed.*

Michael G. O'Donnell obtained judgment against plaintiff in a tort action. In due course, the latter was arrested on an execution issued upon such judgment. In such circumstances, he deposited with defendant, as sheriff, $325 to obtain a release; it being stipulated by the attorneys that the deposit should remain sixty days for plaintiff to file a satisfactory undertaking upon appeal to this court, and that, in case of such undertaking not being so filed, the deposit should be applied on the judgment, so far as necessary to satisfy it, or unless, for cause shown satisfactorily to the court, the time for filing the undertaking should be extended. An undertaking, executed in due form, was served upon O'Donnell's attorney and the original exhibited to him, several days before expiration of the sixty-day period. He then expressed satisfaction therewith and admitted service thereon. Plaintiff's attorney intended to forthwith file such original but left it with O'Donnell's attorney, at his request, so he could show it to his client. Plaintiff acted in good faith, intending to perfect the appeal and seasonably file the undertaking. After it was left with O'Donnell's attorney, as stated, plaintiff's attorney, as claimed, within due time called several times at the

former's office to get and file it. The latter was out of the office and the door was locked. The last ineffectual call was March 9, 1909,—the last of the sixty-day period. He called, again, in the evening of that day, about 8 o'clock, and obtained the paper. It was then too late to file it that day; but it was placed on file as soon as practicable the following morning. In such circumstances, the sheriff used the deposit to discharge the judgment, refusing any of it to plaintiff. He sued to recover the same,—admitting that the undertaking was not filed within the sixty-day period, but alleging the delay was caused by refusal or negligence of O'Donnell's attorney in respect to seasonably returning the paper, and to the knowledge of defendant before appropriating the deposit. The latter answered, alleging failure to duly file the undertaking or secure extension of time therefor. The cause was dismissed on the pleadings. Upon appeal, 142 Wis. 465, 470, 125 N. W. 950, the judgment of dismissal was reversed and cause remanded for a new trial, the court holding that, under the circumstances, there was no neglect or refusal, within the meaning of the deposit agreement, to file the undertaking within the sixty-day period; that the conduct of O'Donnell's attorney precluded the defense of failure to file being effective; that the seasonable service of the paper on such attorney and his approval thereof and the omission to thereafter file it within such period by reason of indulging such attorney, did not warrant appropriation of the deposit.

Upon the trial, the claim that the undertaking was seasonably served on O'Donnell's attorney and was satisfactory to him, but the original was not immediately filed because the attorney asked time to exhibit it to O'Donnell, was established without dispute. There was some controversy about what thereafter occurred between such attorney and plaintiff's attorney. However, that the latter tried to obtain possession of the undertaking for the purpose of filing it, that he failed till too late on March 9, 1909; that the paper was promptly filed the next morning, and that, nevertheless, defendant, with

knowledge of the facts, or reasonable means thereof, appropriated the deposit, were very satisfactorily established.

Plaintiff's attorney testified that he relied upon O'Donnell's attorney returning the undertaking in time for filing within the sixty days; that he visited such attorney's office twice to obtain it, March 9, 1909,—each time finding the door locked; and that he visited it again about 8 o'clock in the evening and obtained the paper. O'Donnell's attorney admitted the latter circumstance and did not deny, positively, that his office was locked at the time plaintiff's attorney called thereat, as he stated, or that he told such attorney at the last visit, he did not think the time for filing had expired. The amount due on the judgment, including fees claimed for collecting it, was $304.31, or $20.99 less than the deposit.

At the close of the evidence defendant's counsel asked for a directed verdict in plaintiff's favor for $20.99. The motion was denied. The cause was submitted by instructions, not excepted to nor appearing in the record. The cause was made to turn on whether plaintiff's attorney failed to file the undertaking because of fault of O'Donnell's attorney. The jury rendered a verdict in plaintiff's favor for $20.99. Judgment was entered accordingly, a motion having been made and denied, in the meantime, to set the verdict aside and for judgment for the amount claimed in the complaint.

The cause was submitted for the appellant on the brief of *John C. Slater,* and for the respondent on that of *Calvin Stewart.*

Marshall, J. This appeal is ruled in favor of the appellant on elementary principles of estoppel *in pais* and by the decision upon the former appeal, 142 Wis. 465, 125 N. W. 950. The condition upon which respondent was authorized to use the deposit in discharge of the judgment, instead of returning it to appellant, was "neglect or refusal" of the latter to file the undertaking within the stipulated

"sixty days." It was respondent's duty, as said upon the former occasion, before applying the money upon the judgment, to ascertain whether such contingency had happened. It was further said before:

"It cannot be held that he [appellant] refused to do so, although he may have been guilty of some negligence in not either insisting on its earlier return or moving the court for an extension of time in which to file." Adding:

"When service was made three days before the time within which to file would expire, and the party on whom the service was made retained the document for his own convenience, and neglected or refused to return it, he should not be heard to say that the other party had 'neglected' or 'refused' to comply with the stipulation, until he had placed such party in a position where he could do so."

The purport of the quoted language is, that, in the circumstances which are undisputed, appellant was entitled to opportunity to file the undertaking after coming into possession of it from O'Donnell's attorney; that to have put appellant in default such attorney should have returned the undertaking in reasonable time for filing it. A neglect to return the paper, or offer to do so, whether appellant's counsel demanded it or not, was neglect to return it within the meaning of the former opinion. It was not essential for plaintiff in order to protect his rights to hunt out O'Donnell's attorney and demand back the paper in time for filing within the sixty days. The latter, under the circumstances, should have been the actor, to the extent, at least, of offering to return the paper within the time.

The case was evidently submitted to the jury upon the theory that appellant was in default in not filing the papers within the sixty days, even if it happened because he did not go to the office of O'Donnell's attorney, when such attorney was in, and make demand for the paper in time for filing. There is no satisfactory impeachment of appellant's evidence that he called at such office during the ordinary business

hours, for the purpose of obtaining the paper, twice on the last day for filing and that the door was locked. That excused making demand, even if such were necessary, in order to prevent happening of the event upon which the deposit could be used as it was. So, in any view of the case, the court should have taken the case from the jury in appellant's favor.

By the Court.—Judgment reversed, and cause remanded for judgment in accordance with the prayer of the complaint.

Covelli, Respondent, vs. Cooper Underwear Company, Appellant.

October 11—October 29, 1912.

Master and servant: Injury from dangerous machinery: Ignorance of risk: Failure to give warning: Negligence: Questions for jury.

1. In an action for injuries sustained by an employee in a knit-goods factory, whose hand was caught by the teeth on a revolving cylinder in a "mixing picker" as he was attempting to remove clogging material from a spout through which the product of the machine was blown into another room, it is *held*, upon the evidence, that it was a question for the jury whether the plaintiff, considering his age, intelligence, and experience, ought in the exercise of ordinary care to have understood and appreciated the danger attending the performance of such duty.
2. It was also a question for the jury, upon the evidence, whether the master was negligent in failing to warn the plaintiff of the danger complained of and which caused the injury; and the trial court having refused to submit that question to the jury, the special verdict as found is not sufficient in law to sustain a judgment against the defendant.
3. A master cannot be held liable for an injury to his servant on the ground that he was negligent in not instructing or warning the servant as to a danger incident to the employment, unless he knew or ought to have known that such instruction or warning was necessary, *i. e.* that the servant was excusably ignorant of the risk.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries received by the plaintiff while employed by the defendant in operating a "mixing picker."

Cotton or wool, or both, are fed into the mixing picker, and, after being worked upon in the machine, the product is blown by air through a spout into a lint room. The cotton or wool, or the two mixed, are thus prepared for carding and spinning. For the purposes of this case the essential parts of the machine are the spout referred to and the "Doffer fan." The Doffer fan is a cylinder about eighteen inches in diameter, studded with straight steel teeth or pins about an inch in length, set two inches apart, and having attached strips of leather that operate as fans. When in operation the Doffer fan revolves very rapidly, the direction of the revolution being upward where the fan crosses the spout through which the lint is carried from the machine. The nearest part of the revolving teeth on the Doffer fan is twenty-five and one-half inches from the opening of the spout. The Doffer fan and the other operative parts of the machine are encased and hidden from the view of the operator.

The plaintiff is a laborer. He is a foreigner and could speak but little English. When injured he was between twenty-three and twenty-four years of age. Previous to the time when he came to work for the defendant, October 16, 1909, he had worked as a ditch digger and upon railroad work while in this country. Before immigrating to this country he resided and worked on a farm in Italy. For five weeks he worked for the defendant on a cotton-carding machine, feeding rough cotton into one side and pulling carded cotton from the other side. During this time he worked off and on for fifteen or twenty minutes at a time, for a total time of an hour or two, at a rag-picker machine, which stood in the same room as the mixing picker.

On November 22, 1909, the plaintiff was put at work on the mixing picker, feeding the material into the machine and keeping the spout clear. He was shown how to feed and was directed to keep the spout clear, without, however, being shown and without inquiring how to stop the machine. The cleaning of the spout was to be performed while the machine was in motion. About five minutes after he had been left to operate the machine he went into the lint room, and, finding the spout clogged, he reached into the spout to clear it. His fingers were caught by the teeth of the Doffer fan, the ends of two of the fingers were chawed off and a third finger was broken, and as a consequence of the injury the plaintiff suffered from tetanus.

The defendant requested that the special verdict contain the following question:

"Was defendant guilty of any want of ordinary care in failing to inform plaintiff of the danger of reaching in too far into the spout, in order to clean out the spout, which want of ordinary care was the proximate cause of the injury?"

This request was refused. Among others the following instruction was asked by the defendant and refused by the court:

"You are instructed that defendant was not guilty of any want of ordinary care in failing to inform plaintiff that it was dangerous to reach in too far into the spout in order to remove clogged material, unless defendant knew or ought to have known that such warning and instruction was necessary."

The jury returned a verdict finding that the defendant had not warned the plaintiff of the danger, that the failure to warn was the proximate cause of the injury, that the plaintiff, before the injury, did not understand the danger of reaching his arm and hand into the spout to remove the clogging material, that, considering the age, intelligence, and experience of the plaintiff, he ought not to have understood and ap-

preciated the danger, and that there was no contributory negligence on his part.

This is an appeal from the judgment in plaintiff's favor in accordance with the verdict.

For the appellant there was a brief by *Harper & McMynn*, and oral argument by *R. N. McMynn*.

Robert Verne Baker, for the respondent.

SIEBECKER, J. The jury found that the defendant's foreman who set plaintiff at work at the mixing picker did not warn the plaintiff of the dangers incident to his duty of removing the clogging material from the spout while the machine was in motion, and that such failure to warn plaintiff was the proximate cause of plaintiff's injury. The inquiry, "Ought the plaintiff, considering his age, intelligence, and experience, in the exercise of ordinary care, to have understood and appreciated . . . dangers attending placing his hand and arm too far in the spout in order to remove clogging material while the machine was running?" the jury answered in the negative. It is well known that a master is not required to give warning of visible and obvious dangers to a servant who possesses the intelligence, understanding, and experience to comprehend and appreciate them. The rule of liability was aptly stated in *Jones v. Florence M. Co.* 66 Wis. 268, 28 N. W. 207:

"We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do the work of such a dangerous character or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first give him such instructions or cautions as will

enable him to comprehend them, and do his work safely, with proper care on his part."

The evidence tends to show that the plaintiff was ignorant of the construction of the mixing picker, that he had very little, if any, knowledge of machinery and had had practically no experience in operating it, and that his experience in a factory was limited to the five weeks he had worked for the defendant before the accident. He testified that the defendant's foreman set him to operate this mixing picker without showing or explaining to him the parts, how the machine operated on the material, or the relation of the Doffer fan to the opening in the spout from which he was directed to clear the clogging material while the machine was in operation. A study of the facts in evidence has convinced us that it was a question for the jury as to whether or not the danger to the plaintiff in the performance of this duty was so obvious, and his knowledge, information, and experience in respect thereto so limited, as to render it necessary that the foreman who directed him to perform this service should have instructed him of such dangers before setting him at this work, and that the court properly submitted this question to the jury.

The contention is also made that the special verdict is insufficient to sustain the judgment in favor of the plaintiff in that there is no finding that the defendant was negligent in not warning the plaintiff of the dangers complained of and which caused the injury. The master's liability to his servant for failure to warn as alleged in this case rests upon the facts:

"(1) That the master was chargeable with knowledge, actual or constructive, of the existence of the risk. (2) That the servant himself did not appreciate the risk, and that his nonappreciation thereof was excusable. (3) That the master knew, or ought to have known, that the plaintiff was thus excusably ignorant of the risk, and was, by reason of such ignorance, exposed to an abnormal hazard, over and above those

which he was presumed to contemplate as incidents of the employment." 1 Labatt, Mast. & Serv. § 235.

The last proposition includes the principle that a master cannot be held liable in such a case unless he is charged with actual or constructive knowledge that the servant was excusably ignorant of the risk.

"Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary. Unless this necessity was or ought to have been known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself." 1 Labatt, Mast. & Serv. § 241.

"Failure to instruct or warn an employee as to risks and hazards attending the employment is not negligence, unless the employer knew, or ought to have known, that such warning and instruction was necessary." *Sladky v. Marinette L. Co.* 107 Wis. 250, 83 N. W. 514, approved in *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289.

The appellant brought this question to the attention of the court by a request that the question be incorporated in the special verdict, and by the following requested instruction:

"You are instructed that the defendant was not guilty of any want of ordinary care in failing to inform the plaintiff that it was dangerous to reach in too far into the spout in order to remove clogged material, unless defendant knew or ought to have known that such warning and instruction was necessary."

We are not clear from the state of the record whether or not the court, upon rejection of these requests, held that the evidence, as matter of law, showed that the defendant's foreman had actual or constructive knowledge that the plaintiff was excusably ignorant of the dangers complained of and incident to his employment. The state of the evidence is not sufficiently clear to show, as matter of law, that the defendant

was negligent in this respect. The evidence is meager on the subject. We find no direct evidence showing that anything was said on the subject by the parties at the time plaintiff was employed or afterwards. Whether or not the defendant failed to exercise ordinary care at the time of engaging plaintiff, or before setting him to operate the mixing picker, to ascertain plaintiff's experience and knowledge, or whether or not, under the facts and circumstances, defendant ought to have known that he was excusably ignorant of the risk, were questions, under the evidence in the case, which should have been submitted for determination to the jury. We are of opinion that the court erred in not submitting this issue to the jury for their decision, and that the verdict rendered is not sufficient in law to sustain a judgment against the defendant. This condition of the record, and the rights of the parties, call for a reversal of the judgment and a retrial of the case.

By the Court.—The judgment appealed from is reversed, and the cause remanded to the circuit court for Kenosha county for a new trial.

MALLORY, Public Administrator, Appellant, vs. WHEELER, Respondent.

October 12—October 29, 1912.

Soldiers' Home: Governor not a federal officer: Jurisdiction: Citation by county court: Public administrator: Property of deceased inmate of Home: Appeal from county court: "Person aggrieved."

1. The governor of the National Home for Disabled Volunteer Soldiers in Milwaukee county does not derive his appointment from the President, from any court of justice, or from any head of a federal department authorized by law to appoint to office, but is appointed by the board of managers as the local manager or governor of said Home, and is therefore not an officer of the United States.

2. The title to the premises occupied by said National Home is not in the United States, but is vested in a corporation created by act of Congress, and the state retains its jurisdiction over the territory embraced therein.
3. A citation to the governor of said National Home, issued out of the county court of Milwaukee county, under the provisions of ch. 120, P. & L. Laws of 1870, as amended by ch. 471, P. & L. Laws of 1871, upon complaint of the public administrator, directing said governor to appear and submit to examination concerning the effects of a deceased inmate of the Home, is not in violation of or inconsistent with any act of Congress governing the Home.
4. Although the rules of the institution contain certain provisions relative to the disposition of the effects of inmates dying therein, there is nothing in such citation to indicate that any federal statute or rule will be violated.
5. An order of the county court requiring the governor of the National Home to submit to examination, at the instance of the public administrator, concerning the estate of a deceased inmate, is appealable; and the governor, being subject to certain penalties for failure to comply therewith, is a "person aggrieved" by such order and may appeal therefrom.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

The appellant, *Rollin B. Mallory,* is public administrator for Milwaukee county; the respondent, *Cornelius Wheeler,* is governor of the Northwestern Branch of the National Home for Disabled Volunteer Soldiers (hereinafter referred to as the National Home), located in the county of Milwaukee. The appellant filed his petition in the county court of Milwaukee county for letters of administration on the estate of John Doe (*alias*), deceased, in which petition all facts necessary to entitle him to letters of administration are alleged. The appellant also filed in said court his complaint on oath in which it is alleged substantially that appellant was public administrator; that the National Home is a corporation owning and controlling land and buildings thereon in the county of Milwaukee; that the respondent was governor of said National Home; that said John Doe (*alias*) died in said

Home intestate, possessed of personal property within said county, and left debts due and unpaid; that he left him surviving neither widow, issue, nor next of kin residing in said county of Milwaukee and no minor heirs; that as governor the respondent has in his possession or under his control goods, chattels, and effects belonging to said deceased, the possession of which belongs to appellant as public administrator; that appellant has duly demanded of respondent that he account for and deliver to appellant all the property in his possession belonging to deceased, but that the respondent has failed and refuses to account for or deliver any of said property to appellant; that the petitioner deems it necessary that the respondent be examined under oath in court concerning said matters, and appellant prays that the respondent be cited to appear before said court and be examined on oath upon the matters of said complaint.

An order for citation was issued out of said court requiring the respondent to appear and submit to an examination on oath touching the matters of the complaint. Upon said order a citation issued directing the respondent to appear and submit to an examination on oath. The respondent appeared specially and moved to vacate and discharge the citation on the grounds (1) that it affirmatively appears from the complaint that no cause for citation to the respondent is alleged in the complaint; (2) that it affirmatively appears from the complaint that if any goods, chattels, and effects belonging to said deceased are in the possession or under the control of the respondent, the same are held by him as an officer, to wit, governor of said National Home; and (3) that as such officer respondent is a United States officer, and his possession as such is the possession of the United States, and that the court has no jurisdiction in the premises of the subject matter of such proceedings nor the person of the respondent as such officer.

The county court overruled the contentions of the respond-

ent and made an order requiring respondent to appear and answer. From this order respondent appealed to the circuit court for Milwaukee county, and the circuit court ruled in favor of respondent, and made an order reversing the order of the county court and sustaining the objections of the respondent to the citation and vacating and setting aside said citation, from which order this appeal was taken.

For the appellant there was a brief signed by *Rollin B. Mallory,* in person, and *Churchill, Bennett & Churchill,* attorneys, and oral argument by *Mr. Mallory* and *Mr. W. H. Churchill.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *J. G. Flanders.*

KERWIN, J. Counsel for appellant relies upon ch. 120 of the Private and Local Laws of Wisconsin for 1870 as amended by ch. 471 of the Private and Local Laws of 1871 respecting the rights and duties of the public administrator for the city and county of Milwaukee, which authorizes investigation by such public administrator for the discovery of goods and chattels in certain cases. The appellant contends that *Governor Wheeler,* the respondent, was bound to appear and answer in accordance with the citation, and that the court below was in error in holding to the contrary.

The case presents some interesting questions and is not free from difficulty. The state law referred to not only authorizes examination and inquiry, but also authorizes the public administrator, in some cases referred to, to take charge of goods, chattels, credits, and estates of persons dying intestate. Ch. 120, P. & L. Laws of 1870 as amended, secs. 4, 7, 8, 9, 10, and 11.

Ch. 16, Supplement to P. & L. Laws of 1865, provides for the incorporation of the "Wisconsin Soldiers' Home," to be permanently located at Milwaukee. By acts of the state legislature of the state of Wisconsin and Congress of the United

States, all the property of the Wisconsin Soldiers' Home was transferred, turned over, and conveyed to the "National Asylum for Disabled Volunteer Soldiers," incorporated by act of Congress. But the acts recognize in the state and reserve to it the right to service of civil and criminal process within the territory ceded. Ch. 16, Supplement to P. & L. Laws of 1865; ch. 68, P. & L. Laws of 1867; Act of Congress of March 21, 1866, secs. 4825 to 4837 inclusive of the Revised Statutes of the United States; ch. 275, P. & L. Laws of 1867; Act of Congress of March 3, 1901, ch. 853, 31 U. S. Stats. at Large, 1175; *In re O'Connor,* 37 Wis. 379.

Ch. 51, U. S. Stats. at Large (vol. 17, p. 417), approved January 23, 1873, provides for the change of the corporate name from "The National Asylum for Disabled Volunteer Soldiers" to "The National Home for Disabled Volunteer Soldiers."

On the part of the respondent it is insisted that *Governor Wheeler,* as governor of the National Home, was an officer of the United States and could not be called to answer under state laws for his acts and doings. Furthermore, that the management of the property and effects of deceased soldiers is exclusively under the control of Congress through a board of managers, under the federal statutes and rules and regulations made in pursuance thereof; that the inmates in said National Home are subject to the rules and articles of war the same as if they were in the army; that the governor of the Home, under direction of the board of managers, is engaged in the internal administration of a federal institution, hence the state legislature has no constitutional power to interfere with such management as is provided by Congress. Respondent's counsel contends that state courts have no authority to interfere with federal officers or agents in the performance of their duties, and cites *In re Neagle,* 135 U. S. 1, 10 Sup. Ct. 658; *In re Loney,* 134 U. S. 372, 10 Sup. Ct. 584; *In re Waite,* 81 Fed. 359; *In re Fair,* 100 Fed. 149.

The general proposition to which the foregoing cases are cited may be admitted, but neither the proposition nor the cases cited rule the instant case. An examination of these cases will show that they involve a situation where there was interference with an officer of the United States or an agent acting under federal authority. *Governor Wheeler* was not an officer of the United States. As a general rule an officer of the United States is one who holds his place by virtue of appointment by the President, by one of the courts of justice, or by the heads of departments authorized by law to make such appointment. 3 Cyc. 818; *U. S. v. Mouat,* 124 U. S. 303, 8 Sup. Ct. 505; *U. S. v. Germaine,* 99 U. S. 508; *Babbitt v. U. S.* 16 Ct. Cl. 202; *Wood v. U. S.* 15 Ct. Cl. 151.

Governor Wheeler does not derive his appointment from the President, from any court of justice, or any head of the federal departments authorized by law to make such appointment. He is appointed by the board of managers as the local manager or governor of the corporation in question. He reports to the board of managers, and the board of managers annually reports to Congress.

This court held in *In re O'Connor,* 37 Wis. 379, that the title to the premises occupied by the "National Home for Disabled Volunteer Soldiers" in Milwaukee county is not in the United States, but in a corporation created by Congress; that the corporation is in its nature a charitable institution and its rights and property are not in any just and legal sense the rights and property of the United States, and that it was not competent for the legislature of Wisconsin to abdicate its jurisdiction over this territory except where the lands are purchased by the United States for the specific purposes contemplated by the constitution.

Counsel for respondent relies strongly upon *Ohio v. Thomas,* 173 U. S. 276, 19 Sup. Ct. 453. Complaint was made in that case by the dairy commissioner against Governor Thomas of the Ohio branch of the National Home for the al-

leged violation of the act of the state legislature of Ohio in relation to the use of oleomargarine. The governor was convicted and sentenced to pay a fine and to imprisonment until the fine was paid. On writ of *habeas corpus* sued out in the circuit court of the United States he was discharged. It will be seen in this case that the prosecution under the state law directly interfered and conflicted with the duty of the governor under federal authority, and it was held that the state legislature had no constitutional power to interfere with the management as provided by Congress.

In *In re Kelly,* 71 Fed. 545, also relied upon by respondent and involving the Milwaukee institution, it was held that the management and officers are agencies of the United States and as such are exempt from any interference by the authorities or courts of the state in their control, discipline, or government of the Homes or property.

In *Boske v. Comingore,* 177 U. S. 459, 20 Sup. Ct. 701, a United States collector of internal revenue was adjudged by a state court of Kentucky in contempt because he refused to file in the state court certain copies of reports which were in his custody as officer of the treasury department, basing his refusal upon a regulation of the treasury department which restricted the use for any purpose other than that specified. It was held that the collector had no authority to do otherwise than to refuse to comply with the order of the state court.

We think it quite clear that these cases do not reach the situation now before us. There was nothing in the order or citation in the instant case in violation of or inconsistent with the acts of Congress or rules and regulations governing the Home. If the citation or order of the county court required *Governor Wheeler* to do any act inconsistent with the federal statutes or rules and regulations in question, a different question would be presented. The order of the county judge provides that *Governor Wheeler* be cited to appear and be examined on oath and to answer such interrogatories as may be put

to him touching the matter of the complaint, and further directs that the citation issue. The citation issued in pursuance of the order and requires *Governor Wheeler* to appear and submit to examination on oath touching the matters of the complaint, and further recites that he is suspected of having in his possession or under his control certain personal property belonging to John Doe (*alias*), deceased, late an inmate of the Home, or show cause to the contrary.

Counsel for respondent lays great stress upon the acts of Congress and rules and regulations made in pursuance thereof relating to the management of the National Home, and argues that the proceeding here instituted is in conflict with such rules and regulations, and cites many sections of the rules in support of this contention. These rules, it is true, provide particularly with reference to the management of the National Home, the settlement of accounts of members, the conservation of property, and generally the management in considerable detail. For example, rule 409 provides for taking immediate possession of the moneys and effects of deceased members; rule 410 provides for appraisal; rule 411 provides that money shall be turned over to the treasurer and all property to the quartermaster; rule 413 provides that in January and July of each year, the day to be fixed by the quartermaster in consultation with the governor, the quartermaster shall sell at public sale the effects of deceased persons, except letters or private papers, bank books, or negotiable securities, which shall be held subject to application by heirs or legal representatives; rule 415 provides that amounts received from sales of the effects of deceased members shall be turned over to the treasurer, etc.; rule 416 provides that all applications for effects of deceased members shall be referred to the manager of the branch to which the deceased member belonged, etc.; rule 417 provides form of application for effects of deceased members; rule 418 provides with reference to application for effects of deceased members, and rule 419 for keep-

ing account of posthumous funds; rule 420 provides for individual accounts in name of deceased members; rule 421 has reference to payment of approved claims.

The foregoing and some other rules referred to are set out in respondent's brief and claimed by respondent to be inconsistent with the present proceeding. The court is not able to agree with counsel in this contention. It is quite clear that, in so far as the order and citation go, there is nothing to indicate that any proceeding will be taken to interfere with the federal statutes and rules and regulations made in pursuance thereof.

It is claimed by appellant that the order from which the appeal to the circuit court was taken was not appealable. Sec. 4031, Stats. (1898), as amended by ch. 593, Laws of 1907, gives any person aggrieved by an order of the county court the right to appeal. The statute under which the present proceeding was taken provides, in effect, that if any person shall neglect or refuse to obey the process provided for he shall be attached and committed to prison. The governor was therefore obliged to comply with the order or suffer the penalties imposed for failure to do so. He was an aggrieved party, and the order appealable. *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900; *Powers v. Powers,* 145 Wis. 671, 130 N. W. 888; *American F. P. Co. v. Winter,* 147 Wis. 464, 133 N. W. 595.

By the Court.—The order of the court below is reversed, and the cause remanded with instructions to the court below to affirm the order of the county court.

SZYMANSKI vs. SZYMANSKI, Appellant: BRZONKALA, Respondent.

October 12—October 29, 1912.

Divorce: Reconciliation of parties: Attorney's fees: Continuing action to enforce payment: Amount: Duty of attorneys.

1. **Where the parties to a divorce action settled their differences and became reconciled within two days after the summons was served and, before the papers were filed in court, the plaintiff wife directed her attorney to dismiss the suit and the husband offered to pay the attorney what his services were reasonably worth, it was an abuse of discretion to continue the action at the request of the attorney merely for the purpose of enforcing payment of attorney fees.**
2. **Where in such case the services of the attorney, who had been a lawyer for but three years, consisted merely in hearing the wife's story and in drafting the summons, complaint, an affidavit, and an order to show cause, a fee of $75 offered by the husband was ample.**
3. **It is the duty of counsel in divorce cases to promote settlement and reconciliation of parties wherever possible, even at the sacrifice of fees when necessary, and such counsel should not unnecessarily make public the domestic discords which are condoned by the settlement.**

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Lorenz & Lorenz,* and oral argument by *Ira Lorenz.*

Walter Schinz, for the respondent.

TIMLIN, J. A summons, complaint, affidavit, and order to show cause returnable November 11, 1910, in this suit for divorce were served upon defendant at 4:30 o'clock p. m. on November 7, 1910. The attorney for plaintiff was *Mr. Peter S. Brzonkala.* The defendant attempted to find his wife's attorney for the purpose of making a settlement on the evening of November 7th, but failed to find him, and was at his office

for the same purpose at 7:30 or 8 o'clock the next morning. To quote from the brief of counsel opposed to him in this court, he "begged that a reconciliation be effected, and asked *Mr. Brzonkala* to call the plaintiff and explain that the defendant was ready to take everything back and apologize for his conduct so that a reconciliation could be effected." The testimony of *Mr. Brzonkala* differs very materially from that of plaintiff and defendant in several important particulars, and we do not intend to pass upon any question of credibility. But it may be safely set down that the efforts of the defendant to effect a reconciliation with his wife were immediate, earnest, and constant, and that *Mr. Brzonkala* either opposed or gave no aid to such reconciliation, and that husband and wife settled their differences and became reconciled on the 9th or 10th of November, 1910. The defendant offered *Brzonkala* $75 for attorney fees, which the latter refused. *Brzonkala* had been a lawyer for three years and seemed to think his services were worth $50 per day. Unable to come to any settlement with *Mr. Brzonkala,* the husband and wife resumed their marital relations and she notified *Brzonkala* to dismiss her divorce suit. He refused to do this, but instead filed the papers against her wish in the circuit court, paid the clerk's fees and suit tax out of his own funds, and on January 3, 1911, applied for and obtained on January 30, 1911, against the objection and exception of the defendant, an order requiring the defendant to pay him the sum of $150 "in full payment for services rendered to him in the above entitled action as attorney for the above named plaintiff." From this order defendant appeals.

In a divorce case as in other cases the circuit court has no doubt jurisdiction to refuse to allow a plaintiff to arbitrarily discontinue his action. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851. To thwart an attempt to defraud an attorney by a collusive settlement might be a very good reason for exercising this jurisdiction even in a di-

vorce case. *Clark v. Burke,* 65 Wis. 359, 361, 27 N. W. 22. But there is no such case here. Where the husband as plaintiff sought leave of court to discontinue a divorce case which he had been carrying on against the wife, and she, opposing the discontinuance, showed that she had in defending this action paid out some attorney's fees and incurred others and that there was alimony in arrears from him, an order of discontinuance was properly conditioned upon the payment of such alimony and a reasonable amount of suit money. *Schulz v. Schulz,* 128 Wis. 28, 107 N. W. 302. Again, there is no such case here. This case is one in which the defendant, as soon as he learned of the divorce suit, made constant efforts to settle it, not surreptitiously or collusively, but with his wife and her attorney. The husband and wife effected a settlement and reconciliation within two days after the service of the summons and complaint and before the domestic broil had been made public by filing the papers in court. The defendant offered to the attorney for his wife a reasonable attorney's fee and the wife ordered this attorney to discontinue the suit. Under such circumstances it was an abuse of discretion on the part of the trial court to continue the divorce suit at request of the attorney for plaintiff therein for the purpose of collecting or compelling payment of his attorney's fees.

The policy of the law favors the reconciliation of the contending spouses, the confidential and private character of transactions and communications between them, the resumption and continuance of the marriage relation, the solidarity of the family, and the end of litigation, especially divorce litigation. These are weighty matters when thrown in the scale against mere attorney fees. There is some indication in the record that *Mr. Brzonkala* does not yet quite fully understand the duties of counsel in a divorce case. This must be attributed to his youth and inexperience, not to any fault of character. Such counsel should promote settlement and

reconciliation of parties wherever possible, even at the sacrifice of his fees when necessary. He should not unnecessarily make public the domestic discords which are condoned by the settlement. There seems to be apparent in this case as well as in some others which have come before us, a notion that any young gentleman two or three years out of the law school has a right to charge at the rate of $50 per day for his services because men of age, experience, and established reputation and capacity to perform much legal work in one day sometimes or ordinarily receive that much. But this is not correct. It does not require long time or great skill to hear the story of cruel and inhuman treatment which forms the basis of a divorce suit nor to draft a summons, complaint, affidavit, and order to show cause in such an action. The amount asked for such services by *Mr. Brzonkala* was exorbitant; the amount allowed by the circuit court was excessive; the amount offered by the defendant ($75) ample.

Our divorce statute, sec. 2361, Stats. (1898), speaks of orders made during the pendency of the action for suit money to enable the wife to carry on the action. The pendency of the action, it is true, may be prolonged by a refusal to permit its discontinuance based upon sufficient cause. To prevent wrong or to do equity the words "to enable her to carry on the action" may include reimbursement to her of moneys theretofore paid by her for the purpose mentioned or might include liabilities incurred by her for a like purpose, as in *Schulz v. Schulz, supra.* But these are exceptional situations. When the parties litigant in a divorce action have become reconciled and they have effectually settled the litigation as between themselves within two days after the suit was begun and before any matter in the action was presented to the court and before the papers were filed in court, and the defendant (husband) has offered to pay his wife's attorney all that the latter was reasonably entitled to for the services performed, it will be held an abuse of discretion to continue

the divorce case merely for the purpose of enforcing payment of attorney fees. The following cases may be consulted, compared with those heretofore cited and distinguished: *Reynolds v. Reynolds,* 67 Cal. 176, 7 Pac. 480; *McCulloch v. Murphy,* 45 Ill. 256; *Beaulieu v. Beaulieu,* 114 Minn. 511, 131 N. W. 481.

By the Court.—Order reversed, and the cause remanded with directions to enter an order of discontinuance.

KASZUBOWSKI, Appellant, vs. JOHNSON SERVICE COMPANY, Respondent.

October 12—October 29, 1912.

Master and servant: Personal injury: Burden of proof: Establishing cause: Conjecture: Taking case from jury.

1. In a personal injury action the burden is upon plaintiff to show to a reasonable certainty that defendant was negligent and that such negligence was the proximate cause of the injury.
2. It is not sufficient in such a case to show two or more possible causes, some of which are actionable and others not, and from such evidence permit the jury to speculate as to which one occasioned the injury.
3. While mounting a ladder to inspect a ventilating fan in defendant's engine room, plaintiff, a carpenter in defendant's employ, slipped and his hand was involuntarily thrown into the fan and injured. Assuming, as claimed by the plaintiff, that grease on his shoes caused him to slip, yet, there being no evidence from which the jury could determine whether such grease came from the floor of the engine room or from the floor of the garage which plaintiff had crossed before entering the engine room and of the greasy condition of which he knew, and, even if it were conceded that the grease came from the engine-room floor, there being no evidence that it had remained upon such floor long enough to show negligence on defendant's part, a verdict for defendant was properly directed.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action for personal injuries. The complaint alleges that on the 30th day of June, 1910, and for some time prior thereto, the plaintiff was employed by the defendant as a bench carpenter and cabinet maker; that on said day he was ordered to remove a ventilating fan from the south window to the north window of the engine room of the building occupied by the defendant. The engine room was located in the basement of the building and was about three or four feet below the level of the basement floor of the building, and about five or six steps led from the basement floor to the engine room. It is further alleged that on said 30th day of June, 1910, and for a long time prior thereto, the defendant carelessly and negligently caused and permitted the floor of the engine room to be and remain in a greasy, wet, oily, and filthy condition, and that the engine room was inadequately lighted by reason of the fact that the windows were covered by a thick wire screen, which prevented sufficient light from entering the engine room; that by reason of such darkness the floor of the engine room could not be seen by a person in the exercise of due care, and was not, and could not have been, seen by plaintiff, and that plaintiff did not know the condition of the floor of the engine room. It is further alleged that in order to reach the fan to be removed it was necessary for plaintiff to walk across the floor of the engine room; that he did so in the exercise of ordinary care, and upon reaching the place where the fan was located, and which he was ordered to remove, he ascended a ladder that was resting on the floor of the engine room and against the window sill to inspect the fan preparatory to removing the same, when, by reason of grease and oil which had accumulated on the soles of his shoes, unknown to him, he slipped, and his right hand was caught in the sharp blades of the revolving fan and the first three fingers thereof were cut off. It is further alleged that, by reason of the carelessness and negligence of the defendant in causing or permitting the aforesaid engine room and the

entrance thereto to be and remain in a dark and dangerous condition, and in causing and permitting the floor of said engine room to be and remain in a dirty, greasy, and oily condition, and in not providing plaintiff with a reasonably safe place in which to work, plaintiff was and is permanently disabled from pursuing his occupation as a bench carpenter, to his damage in the sum of $10,000.

The answer admitted the formal allegations of the complaint and that plaintiff was injured while in defendant's employ, but denied that such injury was caused by reason of any negligence on the part of the defendant, and alleged that such injuries as plaintiff may have suffered were caused by his own negligence, and also alleged that the risk and danger from which the plaintiff suffered were open, obvious, and well known to and assumed by him.

At the close of the testimony the court granted defendant's motion to direct a verdict in its favor. From a judgment entered thereon the plaintiff appealed.

For the appellant there was a brief by *Kronshage, Hannan & McMillan,* and oral argument by *F. A. Hannan.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Irving A. Fish,* of counsel, and oral argument by *Mr. Fish.*

VINJE, J. The evidence as to the condition of the floor of the engine room and as to whether or not the engine room was sufficiently lighted is conflicting. The plaintiff's testimony shows that the engine room was in an oily, greasy, and filthy condition, that oil dripped from the engine almost constantly, and that the floor was not kept clean. His testimony also is to the effect that the engine room was dark by reason of the fact that wire screens were placed over the windows, and the windows were not kept clean. On behalf of the defendant the testimony is that, while more or less oil and grease dripped from the engine, the engine room was cleaned

twice a week, and there was ample light coming through the windows for observing the floor of the engine room. It is conceded that it was necessary for plaintiff, in order to reach the fan, to walk across the engine-room floor. If the correctness of the court's ruling depended upon the questions as to whether or not the engine-room floor was reasonably clean or the engine room was adequately lighted, then the judgment would have to be set aside, because those were, under the evidence, questions for the jury. *Harris v. Cameron,* 81 Wis. 239, 247, 51 N. W. 437. But in view of the evidence as to which there is no conflict we have reached the conclusion that the judgment must be affirmed.

The basement floor, not including the engine room, was known as the garage, and was used by the defendant for repairing automobiles. The evidence shows that plaintiff was familiar with the use to which this floor was put and with the operations there carried on. In the west side of the garage there was a wash rack, and at the northeast corner there was a bench where a steam pipe came out from the boiler room which was used in blowing grease and dirt out of differential and gear casings. Water was also used on the wash rack for the same purpose. On the morning in question some gear casings were blown out which deposited a great deal of dirt and grease on the floor. To the knowledge of plaintiff, the character of the work carried on in this room made the floor wet, greasy, or dirty at all times. In order to reach the engine room plaintiff crossed the garage diagonally from the southwest corner to the northeast corner, passing the wash rack and the bench where the grease was deposited on the floor in cleaning the differential and gear casings, and entered the engine room by descending the flight of steps in the northeast corner of the garage. He then went around the engine and generator, which stood in the center of the room, and came to the ladder. He went up to about the sixth rung to look at the fan, when his foot slipped on the rung and his hand

was involuntarily thrown into the fan and injured. After the accident he went back through the engine room, recrossed the garage floor substantially the same way he crossed it upon entering, and was taken to a hospital. When he reached the hospital he found his shoes were greasy along the sole, the ball of the foot, and heel. He testified that he found a crease on the grease or sole of his shoe indicating where his shoe slipped on the rung. The ladder was selected by a fellow-servant from a number of ladders owned by the defendant, and there is some testimony to show that the ladder itself was greasy. Assuming that the evidence would warrant the jury in finding to a reasonable certainty that there was grease on the plaintiff's shoe at the time he mounted the ladder, and assuming further that a finding to the effect that the grease on his shoe caused plaintiff to slip would be warranted, still there is no evidence in the case from which the jury could find that the grease on plaintiff's shoe became attached thereto on the engine-room floor. It is a mere guess as to whether it became attached there or on the garage floor. The evidence is conflicting as to whether or not there was grease on the engine-room floor, but there is no dispute about the fact that the garage floor was greasy and oily at and over the place where plaintiff walked just previous to his injury, and the trial court correctly held that plaintiff was chargeable with knowledge of the condition of the garage floor and assumed the risk from walking thereon and any risk incident to grease becoming attached to his shoes by reason of walking over such floor. Moreover, if it be conceded that the grease became attached to his shoe on the engine-room floor, it does not appear from the evidence, and it would be a mere guess to infer, that it came from grease, oil, or filth deposited there a sufficient length of time to constitute negligence on the part of the defendant in not having it removed. It is a matter of common knowledge that oil is constantly used in an engine room, and that more or less oil does or may drip from an engine in operation. For

aught that appears, if the oil or grease became attached to the shoe in the engine room it may have been oil or grease deposited there but a few moments. So it is evident that it would be impossible to determine with reasonable certainty whether or not the grease became attached to the shoe on the garage floor, or, if in the engine room, that it was grease negligently allowed to remain there.

In treating the case we have assumed that the grease was on plaintiff's shoe at the time he slipped, that there was no grease on the ladder, and that the grease caused him to slip. These assumptions are perhaps more favorable to plaintiff than the evidence would warrant, especially as to the grease on the ladder. But, even indulging in these presumptions in favor of the plaintiff, the fact remains that it would be impossible to trace the grease on plaintiff's shoe with reasonable certainty to an actionable cause for which defendant was responsible. This burden is placed upon every plaintiff in a personal injury action. It is incumbent upon him to show to a reasonable certainty that the defendant was negligent and that such negligence was the proximate cause of his injury. It is not sufficient to show two or more causes, some of which are actionable and some of which are not, and from such evidence permit the jury to guess or speculate as to which one of the two occasioned the injury. *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657; *Hart v. Neillsville,* 141 Wis. 3, 123 N. W. 125; *Stock v. Kern,* 142 Wis. 219, 125 N. W. 447; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 633; *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142. The trial court, therefore, properly directed a verdict for the defendant because the evidence failed to disclose that defendant's negligence, if any there was, constituted the proximate cause of plaintiff's injury.

By the Court.—Judgment affirmed.

FAUBEL and others, Appellants, vs. ECKHART and others, Respondents.

October 29—November 19, 1912.

Life insurance: Mutual benefit societies: Change of beneficiary: Waiver of regulations: Assignment of policy: Equitable assignment: Rights of parties.

1. With certain recognized exceptions, a member of a mutual benefit association who wishes to change the beneficiary named in his certificate must do so in the manner required by the certificate and the rules of the association.
2. The association may waive compliance with such requirements by issuing a new certificate naming the substituted beneficiary, or by some equivalent act; but it does not waive compliance by interpleading contesting claimants and paying the money into court.
3. Where no beneficiary is named in the certificate and the fund is payable to the estate of the insured, he may make an effectual gift thereof, or transfer the same for value, without complying with such requirements, at least where there is no express regulation forbidding it or avoiding the certificate upon such transfer.
4. In so far as beneficiaries of the fund are named in the certificate, the insured has no title, ownership, or property which he can transfer by assignment. He has a mere power of appointment of a beneficiary during his lifetime, and in that power the beneficiary has no vested interest.
5. Although the insured may be equitably bound by a contract to exercise his power of appointment and change the beneficiaries, yet if he fails to execute that power equity cannot regard it as done, since to do so would nullify the rule that a change of beneficiary must be made conformably to the regulations of the association.
6. Where, however, a certificate was payable in part to named beneficiaries and in part to the estate of the insured, and he contracted for a valuable consideration to change it and have it made payable to his minor children, but died without having carried his agreement into effect, such contract amounted to an equitable assignment of that portion of the fund which was payable to his estate, and the children were entitled to the same as against his executor.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *F. W. Teall.*

For the respondents there was a brief by *A. J. Hedding,* guardian *ad litem,* by *Adolph G. Schwefel,* of counsel, and oral argument by *Mr. Schwefel.* They cited *Grand Lodge A. O. U. W. v. Child,* 70 Mich. 163, 38 N. W. 1; Bacon, Ben. Soc. (3d ed.) § 310; *Pennsylvania R. Co. v. Wolfe,* 203 Pa. St. 269, 52 Atl. 247; *Hall v. Allen,* 75 Miss. 175, 22 South. 4; *Supreme Conclave R. A. v. Cappella,* 41 Fed. 1; *Grand Lodge A. O. U. W. v. Noll,* 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350.

TIMLIN, J. Ernst Eckhart held a certificate of membership in a fraternal association known as the Central Verein der Gegenseitige Unterstuetzungs Gesellschaft Germania. He died on March 27, 1910, a member in good standing in said organization, and his certificate entitled the beneficiary therein named to the sum of $2,000. This membership began on or about August 18, 1888, and in the certificate then issued *Caroline Eckhart,* his wife, was named as beneficiary. Thereafter a suit for divorce by her was pending against him, and he was adjudged guilty of contempt for failing to pay suit money and alimony and committed to prison, from which he was released in April, 1909. On May 20, 1909, deceased surrendered to the association the certificate in which his wife was beneficiary and obtained from it a new certificate in which *Barbara Faubel,* a sister of deceased, was named beneficiary in the sum of $1,000, *Louis Cords,* a friend of deceased, a beneficiary in the sum of $500, and the estate of deceased beneficiary in the sum of $500. This sister and friend of deceased and the executors of the last will and testament of deceased are the plaintiffs and appellants in this action, and the widow and children of deceased are the defendants and

respondents herein. The benefit association named paid the $2,000 in question into court and interpleaded the parties to this action and was itself discharged therefrom. At the time of the issuing of the certificate in question in August, 1888, and from thence until the death of Ernst Eckhart on March 27, 1910, there existed a by-law of the association, regularly adopted and in force, reading as follows:

"A member who desires to change the person or persons named in the certificate as beneficiaries can, if he is in good standing, return his certificate and he shall receive a new certificate payable to such persons as he may desire on payment of one dollar. The request for the change of certificate must be indorsed on the back of the old certificate, signed by the party, and sent to the secretary of the Central Society."

The divorce case was carried to judgment, and on September 20, 1909, the wife had judgment of divorce from her said husband, which further provided that he pay her $50 for her use and benefit and the costs of the action specified, "which sums shall be and are a full and final division of the estate of the defendant and are in lieu of alimony herein." The circuit court found that on and prior to September 11, 1909, there was a large sum of money due from said deceased to his wife upon the order for alimony in the divorce suit, and that on the date mentioned, at a place specified, "it was mutually agreed verbally between said *Caroline Eckhart* and the said deceased that the said deceased would make his minor children, *Caroline Kannenberg, Hilda Eckhart, Alfred Eckhart, Edwin Eckhart,* and *Henry Eckhart,* beneficiaries of the said insurance and therein provide them with the full sum of $2,000, upon condition that the said *Caroline Eckhart* would release him from all claims for alimony and other claims and demands arising out of their relations as husband and wife and properly for consideration in said divorce action, upon the payment to her of the sum of $50 and the costs and disbursements of the action; that said agreement was

carried out by the said *Caroline Eckhart,* and thereafter judgment for divorce duly obtained and entered in said circuit court."

Upon this state of the record the circuit court concluded that the minor children under this agreement were entitled to the $2,000 as against the beneficiaries named in the benefit certificate and the executors of the will of the assured. It is not claimed that the will contained any gift of this insurance money.

The statute provides:

"Any member may change the beneficiary named in his certificate or policy without the consent of such beneficiary, by complying with the by-laws of the society, order or association which issued the same." Sec. 1955*c,* Stats. (Supp. 1906: Laws of 1899, ch. 101).

The cases decided are to the like effect. In *McGowan v. Independent Order of Foresters,* 104 Wis. 173, 80 N. W. 603, it is said to be well settled that one insured in a mutual benefit association who wishes to change the beneficiary named in his certificate or policy must do so in the manner required by his policy and the rules of the association. The case of *Supreme Conclave R. A. v. Cappella,* 41 Fed. 1, is cited with apparent approval, and the comprehensiveness of such rule is accentuated by specifying three recognized exceptions to the rule, no one of which is applicable here. In *Berg v. Damkoehler,* 112 Wis. 587, 88 N. W. 606, in a contest between interpleaded claimants of a fund paid into court by the association it was decided that a written instrument signed by the insured, purporting to change the beneficiary, was insufficient for that purpose when the policy required in addition an acknowledgment and this was not acknowledged. This case purports to follow and applies to such facts the rule of *McGowan v. Independent Order of Foresters, supra.* In *Thomas v. Covert,* 126 Wis. 593, 105 N. W. 922, in a contest between interpleaded claimants, it is ruled that a provision in the con-

stitution of the benefit association, made part of the contract with the insured, to the effect that the change of beneficiary could not be made by will, was binding on the certificate holder and prevented the appointment of a beneficiary by will. In *Armstrong v. Blanchard,* 150 Wis. 31, 136 N. W. 145, it is held that in the absence of such stipulation in the contract of insurance or in the by-laws of the insurer the insured may designate by will the beneficiary, provided he designates some person competent under the rules of the association to be a beneficiary. There is in all these cases a recognition of the right on the part of either the insurer or the beneficiary to insist that in order to be valid the change of beneficiary must ordinarily be made conformably to the stipulations of the policy and the rules of the association, except in the three instances mentioned in *McGowan v. Independent Order of Foresters, supra.* This is in accord with the weight of authority. 1 Bacon, Ben. Soc. (3d ed.) § 307. The association may waive compliance by issuing a new certificate naming the new or substituted beneficiary, or some equivalent act, but it does not waive compliance with its rules by interpleading the contesting claimants and paying the money into court. *Berg v. Damkoehler, supra; Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948; *Ballou v. Gile,* 50 Wis. 614, 7 N. W. 561; *Keener v. Grand Lodge A. O. U. W.* 38 Mo. App. 543; *Sofge v. Supreme Lodge K. of H.* 98 Tenn. 446, 39 S. W. 853. On the other hand there is the case of *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948, where a parol gift *inter vivos,* accompanied with delivery of a life insurance policy payable to the estate of the insured, was held effective against the administrator of insured, although without notice to or knowledge of the insurer, and the policy provided that if the policy were assigned the assignment must be in writing and a duplicate filed with the insurer. It is said that the right to select a beneficiary, secured to the insured either by the policy or the charter or the by-laws of the insurer, is in the nature of a power, and

must therefore be exercised in compliance with the terms of the contract granting the power, while the right of the holder to transfer a policy on his own life and in his possession and control has been upheld as a legal right attaching to the contract. This distinction, it is said, between the right to transfer a policy and to change beneficiaries has not at all times been carefully observed. In *Stoll v. Mutual Ben. L. Ins. Co.* 115 Wis. 558, 92 N. W. 277, this distinction between a transfer of the policy for value and a mere change of beneficiaries is observed, and it is said that, while all assignees are beneficiaries, a mere beneficiary is not an assignee. After a transfer for value the insured could not displace the transferee by designating other beneficiaries. This was a policy originally payable to the estate of the insured. In the two last cases it is worthy of notice that the policies were originally payable to the estate or administrator of the insured.

Thus far the cases would seem to approve of a rule that while the insured must ordinarily, omitting now the three excepted instances, in order to effectively accomplish a mere change of beneficiary, comply with the stipulations of his policy and the binding regulations of the insurer, still he may, where there is no beneficiary named and the fund is payable to his estate, make an effectual gift or assignment, and *a fortiori* a sale and transfer, without complying with such regulations, at least where there is no express regulation forbidding such form of transfer, or avoiding the policy upon such transfer. We here encounter the case of *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689, wherein it is said with reference to these certificates of membership in a mutual benefit association that the insured has no title, ownership, or property in the fund agreed to be paid to another after his death. He has a mere power of appointment of a beneficiary during his lifetime, and in that power the beneficiary has no vested interest. This case is also in line with the weight of authority. 1 Bacon, Ben. Soc. (3d ed.) §§ 236, 237, 289.

We have in this case a situation falling in part within one of the foregoing rules and in part within the other. The rule of law which requires, outside of the exceptions noted in *McGowan v. Independent Order of Foresters,* 104 Wis. 173, 80 N. W. 603, the change of beneficiary to be made conformably to the requirements of the policy and the by-laws and constitution of the benefit association, is simple, consistent, and easily understood and applied. It will diminish the occasions for family quarrels and the temptation to perjury in making proof of oral and comparatively secret agreements to change beneficiaries. The equities in the instant case, as is well remarked by the learned circuit judge, are with the respondents. But equity follows the law in such case, and wisdom, we think, forbids the engrafting of subtile and numerous exceptions upon the rule that, generally speaking, the power to change the beneficiary must be exercised conformably to the regulations of the insurer. There was in this case no change of beneficiary shown, only an agreement based upon a consideration to transfer the policy or to make such change. So far as the beneficial interest of *Faubel* and *Cords* is concerned there was no transfer, for the sufficient reason that the member had no interest which he could transfer. *Hutson v. Jenson, supra.* So far as these interests are concerned, he could only bind himself by contract to execute a power, and he made no attempt to execute it. To now regard it as done would evade the rule that the change of beneficiary must be made conformably to the binding regulations of the association and would in effect nullify that rule. But as to that part of the fund payable to the estate of the insured the latter did have a substantial and salable interest therein within the rule of *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948, and *Stoll v. Mutual Ben. L. Ins. Co.* 115 Wis. 558, 92 N. W. 277. By the contract between the insured and his wife found by the court and supported by a valuable consideration, made for the benefit of the defendants who were then infants, this interest

passed to such defendants. It therefore follows that the judgment appealed from should be reversed, and judgment ordered that the sum paid into court be divided between the contesting parties in the proportion of one half to *Barbara Faubel,* one fourth to *Louis Cords,* and one fourth to the respondents who were infant children of the insured and his wife *Caroline* on September 11, 1909, costs to be in the discretion of the trial court.

By the Court.—It is so ordered; costs of this court to appellants.

STATE EX REL. SCHOOL DISTRICT NO. 1 OF THE TOWN OF MILWAUKEE and others, Appellants, vs. SCHRINER and others, Respondents.

October 30—November 19, 1912.

School districts: Annexation of part of district to city: Formation of joint districts: "Division" of town: Title to district property: Apportionment: Mandamus *to obtain control: Parties.*

1. Sec. 422, Stats. (Supp. 1906: Laws of 1901, ch. 304), declaring that "no new joint district embracing a part of any city shall be hereafter formed," prohibits the formation of a joint school district embracing part of any city, either by direct action or by operation of law.
2. Thus, the annexation by a city of a part of the territory of a school district in an adjacent town did not result in the formation of a joint school district, but that portion of the district which remained in the town constituted a separate school district and the portion annexed to the city became an integral part of the school system of the city.
3. The annexation of a portion of the town to the city was not a "division" of the town within the meaning of sec. 415, Stats. (1898), which provides that districts become joint, without other action, upon the division of a town. That provision applies only where a town is divided and each division thereof remains under a town government.
4. In the case stated, until a proper apportionment was made according to law the legal title to the school property, other than

real property situated in the part annexed to the city, remained unaffected, and the proper officers of the district (elected to take the place of the old officers, all of whom became residents of the city and therefore disqualified) were entitled to the custody and control thereof.

5. Sec. 944, Stats. (1898), applies to a case where territory of one municipality is annexed to another, and contemplates a division of property and adjustment of credits and liabilities in such case as well as in a case where one municipal entity is divided into two distinct municipal entities.

6. The provision of that section (added by the revision of 1898) to the effect that the territory detached from any municipality shall be liable to the remaining portion "for the excess of such share of the municipal property as is situated within it," operates to vest the title to such property in the detached portion, subject to the duty to pay the remaining portion its just share of the value thereof.

7. In *mandamus* by the newly elected officers of a school district, after the annexation of part of its territory to a city, to obtain control of the property of the district in the hands of the old officers who resided in such annexed territory, an adjudication as to whether or not a joint district was created by such annexation was necessary to a disposition of the case, and the city, being interested in that question, was a proper party defendant.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Mandamus. The following facts appear from the petition: In September, 1910, the city of *Milwaukee* annexed a part of the territory of *School District No. 1 of the Town of Milwaukee.* The school house of the district is situated on the parcel so annexed. Prior to the time of the annexation the defendants *Harry Stock, Nick Schriner,* and *Robert Milbrath* were resident electors in, and the duly elected, qualified, and acting officers of, said school district. All of said officers now reside in the territory annexed to the city of *Milwaukee.* Since the annexation aforesaid the relators were duly elected, qualified, and have acted as the officers of that portion of the school district remaining in the town of Milwaukee. They bring this action to recover possession of all moneys, amounting to $1,375.24, papers, deeds, records, books, and other

property belonging to said district now in the hands of the defendants, and pray that the relators be given the care, keeping, and control of the school house located in the annexed territory, and further that they have a judgment or order that the annexation of part of said school district to the city of *Milwaukee* did not constitute such annexed portion a joint school district with the remaining territory. The petition also asks that the defendants be commanded to refrain from claiming a division of the property and money of said *School District No. 1,* and for such other judgment or order in the premises as may be proper. It appears that the defendants refused to turn over to the relators the property in question, and the care, custody, and control of the school house, on the ground that by virtue of the annexation of a part of the district to the city of *Milwaukee* such part forms and constitutes a joint school district with the remaining territory of the district, and that the defendants constitute the legal board of directors of such joint school district, and therefore have a right to the care and keeping of the school house and other property of the joint district. No division of property or adjustment of credits and liabilities has been had as provided for in sec. 944, Stats. (1898).

An alternative writ of *mandamus* was issued. The defendants moved to quash the writ for the reason that neither the petition nor the writ stated facts showing that the relators were entitled to a writ of *mandamus.* From an order quashing the alternative writ and dismissing the action the relators appealed.

For the appellants there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *E. T. Fairchild.*

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *Mark A. Kline,* assistant city attorney, and oral argument by *Mr. Kline.*

VINJE, J. It is obvious that if that part of the school district of the town of Milwaukee annexed to the city became a joint school district with the unannexed part, then the relators have no standing in court, for they were elected after the annexation by a vote of only that part of the district not annexed to the city; and it is equally obvious that the defendants, except the city of *Milwaukee,* who were the directors elected before the annexation, would be lawfully entitled to the possession and control of the school property. On the other hand, if no joint school district was formed, the defendants, who are not residents of the school district, but reside in the city of *Milwaukee,* are not qualified to hold school district offices in the town of Milwaukee. Sec. 431, Stats. (1898). The primary question for determination, therefore, is: Did the annexation result in forming a joint school district between the parcel annexed and the portion of the district remaining in the town of Milwaukee? Sec. 422, Stats. (1898), as amended and now applicable (Supp. 1906: Laws of 1901, ch. 304), provides how joint school districts may be altered or extinguished. The concluding sentence thereof is as follows: "but no new joint district embracing a part of any city shall be hereafter formed." Defendants contend that this applies only to districts formed by the direct action of two independent districts, and does not apply to a district formed by operation of law upon the divisions of towns or the annexation of part of a school district to a city. The purpose of sec. 422, as expressed in *State ex rel. Joint School Dist. No. 2 v. Sweeney,* 103 Wis. 404, 79 N. W. 420, in prohibiting portions of a city from becoming part of a joint school district with an adjacent town, was to preserve uniformity in the school government of all the schools lying within the corporate limits of the city and to put them under one school government. In that case it was held that the change from a village government to a city government, *ipso facto* extin-

guished the joint school district which had previously existed between the village and an adjoining town. If by force of sec. 422 an existing joint school district is dissolved by reason of a portion thereof being incorporated as a city, it is difficult to perceive how a joint district is formed by the annexation of a portion of a single district to a city. It follows from the decision in the *Sweeney Case* that the statute prohibits the formation of a joint school district embracing a part of any city, either by direct action or by operation of law. The disadvantages of and objections to such a school district are equally great whether the district is created by direct action of school boards or by operation of law. Hence it must be held that no joint school district was created by the annexation. That portion of the district which remained in the town of Milwaukee constituted a separate district. That portion annexed to the city of *Milwaukee* became an integral part of the school system of such city.

Defendants also claim that sec. 415, Stats. (1898), which provides that districts become joint upon the division of a town without other action, applies to the case at bar; their argument being that the town of Milwaukee was divided by the annexation of the parcel in question to the city of *Milwaukee,* and therefore a joint district was created pursuant to such section. This claim is deemed untenable. The annexation of a portion of the town of Milwaukee to the city was not a division of the town within the meaning of that section. That relates only to cases where a town is divided and each division thereof remains under a town government. It has no application to a case where a portion of a town is annexed to, and becomes merged in, a city government.

The further contention is made by the defendants that, even if a joint school district was not formed, the relators cannot maintain an action of *mandamus* because the property of the district had not been apportioned between the parts thereof pursuant to sec. 944, Stats. (1898). Since the de-

tached part of the district became subject to the general school government of the city of *Milwaukee,* the relators are the lawfully elected, qualified, and acting officers of *School District No. 1 of the Town of Milwaukee* and as such are entitled to the custody and control of the school property which belonged to said district, the title to which was not changed by the annexation, until a proper division is made according to law. Except as to the real estate, the legal title to the school property was not affected by the annexation, and the officers of the district are entitled to the control and custody of such property until a division is made as provided for in sec. 944, Stats. (1898).

The claim of the relators that sec. 944 does not apply to the case at bar because the portion annexed to the city did not continue as a separate school district or municipal entity, and that it applies only to cases where each part of the divided political division remains a distinct municipal entity, is not well taken. There is nothing in the statute to warrant such a construction. On the other hand, it clearly by its language applies to a case where territory of one municipality is annexed to another, and it contemplates a division of property and adjustment of credits and liabilities in such a case as well as in a case where one municipal entity is divided into two distinct municipal entities.

The relators claim the title to, and right of possession of, the school house, which is located in the portion of the district annexed to the city of *Milwaukee,* founding their claim upon the cases of *Milwaukee v. Milwaukee,* 12 Wis. 93; *Depere v. Bellevue,* 31 Wis. 120. Those cases were decided before the legislature had made any provision for the adjustment of credits and liabilities for property owned by a divided municipality. The portion of sec. 944, Stats. (1898), first enacted was ch. 128 of the Laws of 1876, providing for the apportionment of the bonded indebtedness of any territory divided after the issuance of the bonds. This act was

amended by sec. 2 of ch. 334 of the Laws of 1885, which provided for the adjustment of credits, liabilities, and indebtedness when territory was divided. This act, however, said nothing in express terms about division of property owned by a divided municipality, and, as pointed out in the case of *Board of School Directors v. Ashland,* 87 Wis. 533, 58 N. W. 377, made no provision whereby the old district was entitled to reimbursement for the value of property located in the new district or for credits belonging thereto. This defect in the statute was remedied by the revision of 1898, which provides that the detached territory shall be liable to the remaining portion thereof "for the excess of such share of the municipal property as is situated within it." The doctrine announced in the cases cited can have no application to a case where the legislature has made provision as to the division of credits, liabilities, and property owned by the territory divided. The power of the legislature to provide for a fair and equitable disposition or division of public property in the case of the division or annexation of territory is unquestioned. *Milwaukee v. Milwaukee,* 12 Wis. 93; *State ex rel. Princeton v. Maik,* 113 Wis. 239, 89 N. W. 183, and cases cited.

It is evident from the provisions of sec. 944 added by the revisers in 1898, to the effect that the territory detached from any municipality shall be liable to the remaining portion for the excess of such share of the municipal property as is situated within it, that it contemplated the transfer of the title to such property to the detached portion, and required it to pay to the remaining portion its just share of the value thereof. It is unreasonable to suppose that it would require the detached portion to pay to the remaining portion its just share of the value of property situated within the detached portion if it did not intend to vest the title to such property in the detached portion. So it must be held that the title to the school house which is located in the detached portion became by operation of law vested in such detached portion subject to

the duty to pay the remaining portion its just share of the value thereof. The title to the school house in question having become vested in the detached portion by operation of law at the time of annexation, such detached portion is entitled to the possession and control of the school house. The relators, therefore, have neither the title to, nor the right of possession of, the school house, and as to that the writ must fail. The only right they can enforce as to the school house is their right to receive their just share of the value thereof when the property of the district is divided according to law.

The objections of the defendants that the city of *Milwaukee* is not a proper party are not well taken. It is true the petition does not ask that it turn over any of the property in question, but it does ask for an adjudication that no joint school district was formed between the annexed parcel and the remaining portion of the school district, and such adjudication was absolutely necessary to a disposition of the case. The city of *Milwaukee* was interested in, and affected by, the adjudication of such question, and was therefore a proper party defendant.

It follows from this opinion that the relators are entitled to a writ of *mandamus* requiring the defendants *Harry Stock, Nick Schriner,* and *Robert Milbrath* to turn over to the relators the care, keeping, possession, and control of the moneys, papers, deeds, records, books, and other personal property belonging to *School District No. 1* remaining in the hands of said defendants; and adjudging that said defendants refrain from acting as the board of school directors of *School District No. 1 of the Town of Milwaukee;* and that the relators have judgment against said defendants, and the defendant the city of *Milwaukee,* that the annexed parcel does not constitute a joint school district with the remaining territory of *School District No. 1 of the Town of Milwaukee.*

By the Court.—Order reversed, and cause remanded for further proceedings in accordance with this opinion.

RAASCH, Administrator, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

October 30—November 19, 1912.

Street railways: Collision with vehicle crossing track: Gross negligence: Direction of verdict: Positive and negative testimony.

1. **In an action against a street railway company for death of plaintiff's intestate, claimed to have been caused by gross negligence of a motorman whose car collided with a milk wagon on the step of which the deceased was riding, it is *held* that the evidence (showing that the gong was rung and that efforts were made to stop the car) did not warrant a conclusion of gross negligence, and that a verdict for defendant was properly directed.**
2. **The mere negative testimony of one witness that he did not hear the bell nor see any effort to stop the car, is not sufficient to justify a reversal of the decision of the trial court based on positive testimony to the contrary.**

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *W. H. Frawley & T. F. Frawley.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *Clarke M. Rosecrantz.*

WINSLOW, C. J. The plaintiff's intestate was driving a horse attached to a milk wagon southward on Twentieth avenue in the city of Milwaukee at about 6 a. m. July 1, 1908. The wagon was covered and the intestate was standing on the westerly or right-hand step of the wagon. Just as the wagon crossed defendant's northerly track, running east and west on Greenfield avenue, one of defendant's street cars, west bound, ran into the rear of the wagon, tipping it over, and causing the death of the intestate. The plaintiff claims that the evidence was such as to justify the conclusion of gross negligence on the part of the defendant's motorman, but the trial court

held to the contrary and directed a verdict for defendant at the close of the plaintiff's evidence. It is not claimed that there is any ground of recovery save the ground of gross negligence. The question presented on this appeal is whether there was error in the direction of a verdict for defendant. The testimony as to the speed of the car varied from six or seven miles to fifteen or twenty miles per hour. The motorman testified that he first saw the milk wagon when his car was about the middle of the block, *i. e.* about 150 feet east of the wagon; that he at once put on the brakes, rang the gong, and put on the reverse current; that the brakes did not take hold well and the wheels slipped on the rail because it was dirty in spots. Another motorman, who was on the front platform of the car at the time, corroborated this testimony fully. Two disinterested witnesses, who were on the sidewalk, one directly opposite the car and the other some 200 feet distant, testified positively to the ringing of the gong, and they also testified to the fact that the car slowed up at once, and that they saw the motorman putting on the brakes; while a third passerby testified to the slackening of the speed and the putting on of the brakes. In addition to this, the weight of the evidence is to the effect that the car had nearly reached a stop before it struck the wagon.

As opposed to this mass of evidence, which entirely excludes the idea of wanton or reckless disregard of life on the part of the motorman, there is the testimony of one witness for the plaintiff, who stood on the sidewalk some 200 feet away, and who testified that he did not hear the gong nor see the motorman attempt to stop the car, and of another witness, a block further away, who thought the speed of the car was about the same all the way until the wagon was struck. If the motorman sounded the gong as soon as he saw the wagon and attempted to stop the car at once, there can be no reasonable claim of gross negligence, even if in the exercise of due care he ought to have seen the wagon earlier.

The mere negative testimony of one witness who testified that he did not hear the bell nor see any effort to stop the car cannot be deemed sufficient to justify this court in reversing the decision of the trial court, especially when that decision is given the weight and deference to which it is entitled.

By the Court.—Judgment affirmed.

MAURER, Respondent, vs. NORTHWESTERN IRON COMPANY, imp., Appellant.

October 30—November 19, 1912.

Limitation of actions: Condition precedent: Notice of personal injury: Irregularity in service: Waiver.

1. A mere irregularity in the manner of serving the notice which, under sec. 4222, Stats., must be given as a condition precedent to the right to maintain an action for injury to the person, may be waived.
2. Where defendant received, without objection, a notice of injury which, though sufficient, was not served in the manner required by the statute, and acted thereon, assuring the plaintiff that no further notice was necessary, the irregularity in service was waived.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover compensation for an injury. In respect to the notice required by sec. 4222, Stats., the pleader stated this: The injury occurred December 7, 1908. January 30th thereafter, plaintiff mailed to defendant, in whose service and by whose breach of duty such injury happened, a signed notice. It was received and responded to in writing, through the Employers' Liability Assurance Corporation. In April, 1909, defendant's attorney and agent visited plaintiff and inquired into the nature of his injuries; then informing him

that further notice of the injury was not necessary. Plaintiff relied thereon, believing his claim would be settled without suit, and no further proceedings on his part would be required. The action was commenced October 13, 1910. A copy of the notice and response were made part of the complaint. The former, it was conceded on the argument, as the fact is, contained the essentials required by the statute, and satisfied the calls thereof, except as to manner of service. The response informed plaintiff his claim was in the hands of the insurance company for adjustment and would be taken up for settlement and indemnity through its general agent.

Defendant demurred to the complaint for insufficiency, and, specially, because the notice of injury was not properly served. The demurrer was overruled.

For the appellant there were briefs by *Quarles, Spence & Quarles,* attorneys, and *Irving A. Fish,* of counsel, and oral argument by *Mr. Fish.*

For the respondent there was a brief by *Carroll & Carroll,* and oral argument by *G. J. Carroll.*

MARSHALL, J. Sec. 4222, Stats., prescribes the manner of serving a notice of injury in the circumstances of this case. "Such notice shall be given in the manner required for the service of summons in courts of record" are the words of the statute. The giving of the notice is the material thing. It is made a condition precedent to the maintenance of an action to recover damages. It is not a condition of the existence of a cause of action but one of limitation upon opportunity to judicially enforce an existing such cause. While not a statute of limitation, in the technical sense, it is so near akin thereto as to be classed therewith and called "a statute in the nature of a statute of limitation." *Meisenheimer v. Kellogg,* 106 Wis. 30, 81 N. W. 1033; *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003; *Malloy v. C. & N. W. R. Co.* 109 Wis. 29, 85 N. W. 130. So classed, the doctrine as to waiver of

the right to insist upon the benefit of the statute by failure to raise the question by answer or special demurrer, in case of the fact appearing upon the face of the complaint, or by answer where it does not, has been adopted in respect thereto, though the court has, in special circumstances akin to fraud preventing compliance with or inducing failure to comply with it, held that the statute is so far different from an ordinary one of limitations, that a person may estop himself from having the benefit thereof. *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234.

We will say, in passing, that counsel erred in supposing that *Arp v. Allis-Chalmers Co.* 130 Wis. 454, 110 N. W. 386, modifies or adds to *Troschansky v. Milwaukee E. R. & L. Co.* 110 Wis. 570, 86 N. W. 156, or that *Uhlenberg v. Milwaukee G. L. Co.* 138 Wis. 148, 119 N. W. 810, overruled either. The latter is perfectly consistent with the doctrine that the statute is one of limitations and extinguishes a right upon which it operates the same as other such statutes; and, at the same time, that the point cannot be insisted upon, except by answer or demurrer. A limitation right, though one which supersedes another upon which it acts, is waivable under some circumstances. By the policy of our statutes and practice it is waived by not insisting thereon by special demurrer or by answer.

So it is plain, that the statutory right created by sec. 4222, Stats., may be lost by estoppel, as in *Guile v. La Crosse G. & E. Co., supra,* or waived in the action by failure to properly raise the question.

It would seem to follow, necessarily, that any mere detail of giving the notice, not affecting the real purpose of the statute, such as the particular manner of service, so long as another way is substituted whereby the requisite information is furnished and acted upon, is waivable: that if a distinct purpose to waive appear, either expressly or inferentially, it will be effective, regardless of any element of estoppel, in the tech-

nical sense. As to whether a mere irregularity in the manner of giving the notice may be waived, is one thing, failure to give any notice at all is quite a different thing. The former, it is considered, on elementary principles of natural justice, is subject to waiver. A person may waive almost any statutory right provided for his protection. There are some limitations upon that on grounds of public policy. So, regardless of the rule as to whether a vested right created by the expiration of the period prescribed by an ordinary statute of limitation, may be lost by waiver or estoppel, except by failure to seasonably take advantage of it by pleading, the rule cannot be logically extended to details of complying with the statute involved here.

There being no question as to the power to waive the statutory manner of challenging attention of the person liable for damages, as in this case, that a waiver is amply pleaded here seems likewise plain. No clearer case of waiver could be made than by receipt of and action upon an irregularly served notice characterizing such conduct by an assurance that no further notice would be required to secure adjustment of the claim.

By the Court.—Judgment affirmed.

KRAWIECKI, Respondent, vs. KIECKHEFER BOX COMPANY, Appellant.

October 30—November 19, 1912.

Master and servant: Injury from breaking of unguarded belt: Feasibility of guarding: Expert testimony: Qualification of witness: Evidence: Competency: Weight and sufficiency: Questions for jury: Special verdict: Form: Appeal: Conclusiveness of verdict based on opinions: Excessive damages: Remission of part.

1. One who has had experience with machinery of the kind in question and is familiar with conditions and practices in factories in the vicinity, is qualified to testify as to the feasibility of guarding a belt which operates such machinery, and as to his experience and observation on the subject.
2. In an action for personal injuries caused by the breaking of an unguarded belt, a question propounded by defendant to its foreman as to whether any factory inspector or other official had suggested that the belt ought to be guarded, was properly excluded in the absence of any evidence that the attention of such inspectors or other officials had ever been called to the belt or to the conditions under which the machinery was operated.
3. Evidence considered and *held* insufficient to establish as a matter of law that there was no custom in wood-working factories of guarding belts under the conditions and circumstances existing in this case.
4. Evidence as to the practice in other factories with reference to guarding belts used to operate similar machinery was competent as bearing upon the question whether defendant exercised ordinary care in determining whether or not the belt in question ought to have been guarded.
5. Upon conflicting evidence as to the circumstances surrounding the plaintiff and the conditions under which he worked, the question of his contributory negligence was for the jury.
6. Where the special verdict as submitted covers in proper form all of the issues raised by the pleadings and evidence, there is no prejudicial error in refusing to submit additional questions.
7. The verdict of a jury founded solely upon the opinion of experts as to the cause of a condition (in this case the loss of sexual power), which condition is itself established only by the opinion of experts, has no conclusive weight even in the appellate court.

8. Such condition having been submitted to the jury as an element of damages upon evidence too vague and unsatisfactory, in the opinion of this court, to justify such submission, a judgment upon the verdict awarding plaintiff $2,000 is reversed and a new trial awarded unless plaintiff elects to remit all of the damages in excess of $1,000, which sum is deemed as low an amount as an impartial jury upon the competent evidence would award.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The plaintiff was injured on March 15, 1910, in defendant's factory by the breaking of a belt on a planing machine which the plaintiff was feeding. The plaintiff was fifty-four years of age and had worked for the defendant for thirteen years. This is an action to recover damages for the injuries suffered by him by reason of the breaking of the belt.

The complaint alleges that the belt was worn and defective and was so placed that the person operating the machine could and would inadvertently come into contact with the belt and the pulley on which it ran; that the belt was not inclosed or guarded as were like belts on like machines in the city of Milwaukee and vicinity; that such inclosing and guarding could be done at but a nominal expense and so as to effectively protect from injury by a breaking of the belt the person operating the machine; that on March 15, 1910, the truck load of lumber which the plaintiff was to feed into the planer was so placed at the left of the planer, because of the crowded condition of the shop in which the plaintiff was working, that it was necessary for the plaintiff to reach over the belt which broke in order to take the lumber from the truck; and that while the plaintiff was so employed at the planer one of the belts on the machine suddenly broke and the broken end flew with great force against the plaintiff, causing the injuries. The injuries suffered are particularly described, negligence on the part of the defendant in several respects is alleged, and damages are demanded.

The answer denies that the belt was defective; that the person operating the planer was required to reach over the belt to secure the lumber it was his duty to feed into the planer; and that the belts were unguarded or so situated that the person operating the machine would inadvertently come into contact with the belts or be compelled to stand in dangerous proximity to the belts in the performance of his work; and alleges contributory negligence on the part of the plaintiff in failing to inspect and report any defective condition of the belts; and that the plaintiff assumed the risk.

Exception was taken on the trial to the opinion evidence of a witness as to the guarding of similar belts on iron-working machines and to the evidence of this witness that such belts could be guarded and that they were ordinarily guarded in Milwaukee factories. Exception was also taken to the refusal of the court to permit the defendant to show that factory inspectors had not suggested that this belt should be guarded and to the exclusion of evidence that feeders of planers objected to belt guards. The defendant objected to evidence that the injury as described would account for the plaintiff's nervous condition and that such nervous condition would be a cause of the loss of sexual power.

Evidence was presented by the defendant tending to show that whatever guarding there was of such belts in Milwaukee factories was to prevent injuries to persons by reason of their clothing being caught in the pulleys and belts, and that such guards were not designed to prevent injuries from the breaking of belts, and that guards for this purpose were ineffective and a source of greater danger.

The plaintiff was at the hospital for four or five days. The physician who attended him after he returned to his home testified that the plaintiff's left leg was very much contused, swollen, and discolored, there was considerable enlargement of the veins, his testicles were enlarged and discolored, and the scrotum was almost black. At the time of trial plaintiff's testicles were still enlarged and there was some enlarge-

ment of the veins; he was shaky and had no control of his nerves.

The plaintiff testified that after the accident he had lost his sexual power. The medical testimony in plaintiff's behalf as to his condition in this respect at the time of the trial was that the plaintiff's testicles were of good size and that his organs were apparently normal; that the physicians were unable to tell whether the testicles were larger than they were before the accident; that the accident was sufficient to account for the plaintiff's nervous condition; that the nervous condition of a man may affect his sexual power, but that plaintiff's nervous condition was not an adequate cause for the loss of sexual power.

The court denied a motion for a verdict for the defendant, and refused to give certain instructions and to submit certain questions requested by the defendant.

The jury found that the plaintiff was injured by a broken belt while at work at the planer in the defendant's factory; that the belt was so located as to be dangerous to employees in the discharge of their duties; that the failure to guard or fence the belt was the proximate cause of the injuries suffered by the plaintiff; and that the plaintiff was not guilty of contributory negligence.

The court in submitting the elements of damage for which compensation was proper included the element of loss of sexual potency; the appellant excepted and now avers that the court erred in this regard.

This is an appeal from the judgment on the verdict in plaintiff's favor for $2,000 damages and for costs.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

W. B. Rubin, for the respondent.

SIEBECKER, J. The claim that the witness Wikkerink was improperly permitted to testify as to guarding the belt because not qualified to speak on the subject is not sustained.

The evidence discloses that he had had experience with machinery of the kind in question, that he is familiar with present conditions and practices in factories in Milwaukee, and that he has knowledge on the subject.

The court excluded the following inquiry, propounded by the defendant to its foreman as a witness: "Did any factory inspector or other official at any time before this accident suggest to you that this planer, as to its belts that I am referring to, ought to be guarded or covered?" There is no showing that the method of operating this planer and belting came to the notice of any inspector or that any inspector was advised of these conditions and the situation. Under such circumstances an answer to the propounded inquiry was properly excluded. The materiality of the question and the evidentiary force of an answer thereto must rest on the fact that the circumstances and the condition of the situation of this planer and the belts referred to were known to the inspectors and that they acted on such knowledge in not suggesting that the belting should be guarded.

It is contended that the evidence is without dispute that there is no custom in wood-working establishments of placing guards around belts like the one in question, and that the court erred in denying defendant's motion to direct a verdict in its favor upon that ground. An examination of the evidence discloses, however, that the witness offered by the plaintiff on this subject testified that such guards are in use on rapid-running planers and that they are practical. Nor is the evidence on the subject adduced by the defendant so clear and convincing in itself that it can be held as matter of law to establish such a custom as defendant asserts. Taking all the evidence, it clearly does not justify the claim that the court should have held as matter of law that there is no custom in wood-working factories of guarding belts under the conditions and circumstances that existed here. Such evidence, however, was properly received as bearing on negligence. As de-

clared in *Boyce v. Wilbur L. Co.* 119 Wis. 642, 97 N. W. 563: "As a general rule, evidence to show the usual or ordinary methods of others in the same business is admissible upon the question of negligence" (headnote), but not if such evidence contradicts common knowledge or if it shows a method so obviously dangerous as to be recognized as such by all intelligent persons. The court, after instructing the jury that the evidence as to custom did not justify him in holding as matter of law that the defendant was absolved from the duty of guarding the belt, instructed them to consider all such evidence in connection with the other evidence in deciding whether the defendant's officers and agents had exercised ordinary care in determining whether or not such belting ought, under the circumstances and conditions, to have been guarded. This was a proper submission of this issue and the evidence to the jury.

A further contention is made that the court erred in refusing to hold that the plaintiff, under the evidence in the case, was guilty of contributory negligence. This claim is based on the ground that the plaintiff did not stand in the usual and proper place while feeding the planer, and that he so placed the truck loaded with lumber as to make it dangerous to get the lumber from the truck and feed it into the planer. It is argued that the plaintiff's carelessness in placing the loaded truck at the side of the planer and in then reaching over the running belt exposed him to the danger complained of, and that he should have placed the truck behind him near the place which he ought to have occupied to perform his duty of feeding the lumber into the planer. Plaintiff testified that the loaded truck stood in the proper and customary place; that there was not sufficient room in the doorway to the south and back of him while he was feeding the planer; and that it was the common practice to place the loaded truck where it stood at the time of the accident, because it was the proper and most convenient place from which to handle the long

lumber. In these matters the plaintiff is corroborated by some of the witnesses and contradicted by others. Under such circumstances the question of his contributory negligence was one to be resolved by the jury.

An exception is urged to the court's refusal to incorporate in the special verdict certain questions which appellant requested. The verdict submitted covered the issues raised by the pleadings and the evidence and is in proper form. The rejected questions embraced findings of facts which were necessarily included in the verdict rendered under the direction of the court and pursuant to the instructions given the jury. We are satisfied that in the verdict rendered the jury have found every essential fact involved, and hence that no prejudicial error was committed by not incorporating the special questions requested in the verdict. *Milwaukee T. Co. v. Milwaukee, post,* p. 224, 138 N. W. 707, and cases cited.

The court's instructions to the jury as to the law applicable to the issues covered by the verdict are correct and sufficiently cover the case. In our opinion appellant was not prejudiced by the court's omission to give any of the specific instructions requested.

Other alleged detail errors are not of sufficient importance to be specifically noted. We do not find that any of them were prejudicial to the appellant, aside from the subject of damages, which will now be considered.

Appellant objected to the introduction of evidence on the alleged element of damages as to plaintiff's loss of sexual power, and requested the court to exclude this alleged element of injury from consideration by the jury. The court, however, informed the jury that they might include as an element, for which plaintiff could recover damages, "the loss and impairment of his sexual powers, if any such loss or impairment existed or exists, and if so, if it was a proximate result of such injury," and such impairment as should be found to continue in the future. The evidence on the subject is

very meager and uncertain, and speculative to a high degree, and amounts to no more than mere opinion. The facts on this branch of the case are not satisfactory and come within the views expressed by this court in *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518:

"The verdict of a jury founded upon facts is entitled to great weight, and is almost conclusive upon this court if supported by any evidence. But the verdict of a jury founded only upon the opinion of experts concerning the cause of a condition, which condition is itself established by the opinion of experts, has no such weight" (citing).

The considerations advanced in that case for the rejection of the loss of sexual potency as an element of damages apply with all their force to the evidence before us in this case. We are led to the conclusion that the court erred in submitting this phase of the case to the jury as a basis for the allowance of compensatory damages, and that the judgment rendered is therefore erroneous and must be reversed. We have, however, examined the evidence in the case and are persuaded that we should follow the practice adopted in the cases of *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644, and *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10, and permit the plaintiff to avoid a new trial upon reversal of the judgment entered by electing to remit from the amount of damages assessed by the jury a sum which will reduce the award of damages to as low an amount as an impartial jury on the evidence would probably name. In our judgment that sum is $1,000.

By the Court.—Judgment reversed, and action remanded for a new trial, unless the plaintiff elect, within thirty days after the filing of the *remittitur* in the trial court, by notice in writing served on the defendant's attorney, to take judgment for $1,000 with costs, in which case judgment shall be rendered therefor upon motion in that court.

STATE EX REL. MILLER and another, Respondents, vs. THOMPSON, City Clerk, Appellant.

October 30—November 19, 1912.

Taxation: Board of review: Certiorari: *Jurisdictional errors: Valuation of real property: Improvements: Evidence of true value: Presumptions.*

1. The judicial review, on *certiorari*, of the action of a board of review extends only to the correction of jurisdictional errors.
2. An assessor's valuation laid before a board of review is presumed, in the absence of evidence to impeach it, to be correct; and it is also presumed that the decision of the board of review as to valuation is correct.
3. The fact, shown before a board of review, that real property is not on a paying basis as presently managed does not establish its value; nor does the fact that old buildings thereon if torn down would be worth only the wreckage establish their value as a going concern; nor does the fact that the owner will derive a larger revenue from a lease of the land for ninety-nine years, which has been made to one who will tear down the old and erect new buildings, show that the present buildings are not worth the assessor's valuation.
4. Evidence of such facts is not evidence of the market value of the property or the price which could ordinarily be obtained for it at private sale (sec. 1052, Stats.); and the affirmance by the board of review of the assessor's valuation, notwithstanding such evidence, was not a jurisdictional error.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Daniel W. Hoan, city attorney, for the appellant.

For the respondents there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake.*

KERWIN, J. This is a proceeding by *certiorari* to review a judgment of the circuit court for Milwaukee county declaring illegal and void the action of the board of review in confirming the assessor's assessment of certain property be-

longing to the estate of John Plankinton, deceased, and setting aside the assessment and action of the board of review. The matter was brought to a hearing upon the return of the appellant, *Carl D. Thompson,* city clerk of the city of Milwaukee, and as such clerk of the board of review. The errors assigned involve the following propositions: (1) That the assessment of $2,900,000 on the real estate and improvements was improper, arbitrary, illegal, and without jurisdiction; (2) that the assessed valuation of said property for the year 1911 should have been fixed by the board of review at the sum of $2,600,000, apportioned as follows: $2,600,000 as the assessed valuation of real estate exclusive of buildings and improvements thereon, and no dollars as the assessed valuation of the buildings and improvements on said real estate.

The real controversy on this appeal is whether the board of review was justified in affirming the assessment. The property involved is the Plankinton House property in the city of Milwaukee. The assessment had been entered upon the assessment roll and delivered to the city clerk of the city of Milwaukee. The judgment of the circuit court reversed the action of the board of review and set aside the assessment. A writ of *certiorari* was issued at the instance of *H. A. J. Upham* and *George P. Miller* as trustees of the estate of John Plankinton. The assessment placed upon the property by the assessor was itemized between the real estate and improvements on the real estate as follows: Real estate $2,600,000, improvements $300,000. On the hearing it was conceded, for the purpose of the hearing at least, that the real estate exclusive of buildings was worth $2,600,000, but objection to the assessment of the additional $300,000 on account of buildings and improvements on the real estate was pressed. *George P. Miller,* one of the trustees of the Plankinton estate, testified before the board of review that he was familiar with the land in controversy, giving a description of it; that the property had been rented at best available prices, and that in

the course of the last few years the taxes and rents have increased; that the assessment of $2,600,000 for the ground is about right, or at least he did not desire to make any particular objection to it; that, considering the real estate worth $2,600,000, the improvements thereon are only worth the wreckage, because with an assessment of $2,600,000, estimating taxes at seventeen mills, the taxes upon the property would be in the neighborhood of $50,000, and if the hotel business situate upon the property did not make money the rent from the property, after payment of expenses and repairs, would not pay the taxes; that in order to make the property earn the taxes it has to be improved, and to run the property in the present state with the present improvements, with taxes increasing, would mean confiscation, as the taxes would take all the income; that the trustees have been trying for three years to rent the property for a period of ninety-nine years and have negotiated to that effect; that a ninety-nine year lease would secure an average annual rental of about $125,000; that the property was further menaced because the buildings, especially including the Plankinton House hotel, are old and not in accord with what people expect in a first-class hotel, therefore the lessee intends to tear down the buildings and construct a new hotel, hence the improvements, including the buildings, furniture, fixtures, etc., are largely sacrificed; that even if the estate had not been leased and the buildings used, every year they use them they are running behind, and the buildings have no market value, because, in case of the removal of these and the erection of new buildings, the old buildings are worth only wreckage; that the real estate is so valuable it has to be improved in order to make it earn anything, or the taxes will eat it up, and if it is necessary to improve it in order to make the taxes you cannot say the improvements are worth a cent; that the ninety-nine year lease is in effect subject to the approval of the court; that insurance policies are out on these buildings for

at least $300,000; that the total rentals in 1909 were between $70,000 and $71,000.

The foregoing is in substance the material part of the evidence given by *Mr. Miller,* and no other evidence was offered on the part of the trustees. The question, therefore, arises whether the board of review was within its jurisdiction in affirming the valuation made by the assessor. The fact that the property is not on a paying basis as presently managed does not establish its value, nor does the value of the buildings if torn down establish their value as a going concern. So far as the evidence shows, the buildings may be the main source of revenue, and without any buildings there would be no revenue from the property. Nor does the fact that a ninety-nine year lease and new buildings will produce more revenue from the property establish that the present improvements on the ground are not worth the assessed valuation.

Real estate should be valued by the assessor at the full value which could ordinarily be obtained therefor at private sale. Secs. 1035 and 1052, Stats.; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *Salscheider v. Fort Howard,* 45 Wis. 519. The evidence of *Mr. Miller* was not evidence of the market value of the property or what price could ordinarily be obtained for it at private sale.

In review upon *certiorari* only jurisdictional matters can be reached, and the action of the board of review cannot be disturbed if there be reasonable ground for belief that it was the result of honest judgment. *State ex rel. N. C. Foster L. Co. v. Williams, supra; State ex rel. M. A. Hanna D. Co. v. Willcuts,* 143 Wis. 449, 128 N. W. 97; *State ex rel. Augusta v. Losby,* 115 Wis. 57, 90 N. W. 188; *State ex rel. Manitowoc v. County Clerk,* 59 Wis. 15, 16 N. W. 617; *State ex rel. Lake Nebagamon Ice Co. v. McPhee,* 149 Wis. 76, 135 N. W. 470, and cases cited.

An assessor's valuation laid before a board of review is presumed, in the absence of evidence to impeach it, to be cor-

rect. *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359. And the presumption is that the decision of the board of review as to valuation is correct. *State ex rel. Davis & S. L. Co. v. Pors,* 107 Wis. 420, 83 N. W. 706; *State ex rel. Giroux v. Lien,* 108 Wis. 316, 84 N. W. 422; *State ex rel. J. S. Stearns L. Co. v. Fisher,* 124 Wis. 271, 102 N. W. 566; *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777; *State ex rel. Ellis v. Thorne,* 112 Wis. 81, 87 N. W. 797.

The judicial review of the action of the board of review on *certiorari* only extends to the correction of jurisdictional errors. *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *State ex rel. Edward Hines L. Co. v. Fisher,* 129 Wis. 57, 108 N. W. 206. We are convinced that there was no jurisdictional error in the decision of the board of review in affirming the valuation of the assessor, therefore the court below was in error in disturbing the decision of the board.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to affirm the decision of the board of review.

CHAIN BELT COMPANY, Plaintiff in error, vs. CITY OF MILWAUKEE, Defendant in error.

October 31—November 19, 1912.

Municipal corporations: Power to license occupations: Elevators: Milwaukee city charter: Statutes: Construction.

1. A city has no authority to impose license taxes upon persons engaged in particular occupations or, for the purpose of regulating such occupations under the police power, to require that persons engaged therein be licensed, unless such authority has been expressly or by necessary implication granted by the state. It cannot be implied from the "general welfare" clause in the city charter.

2. A statute giving power to license must be strictly construed, and doubt or ambiguity arising out of the language employed must be resolved in favor of the public.
3. Neither the general statutes nor the charter of the city of Milwaukee give that city power to license elevators or elevator operators.

ERROR to review a judgment of the municipal court of Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

For the plaintiff in error there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *Nathan Glicksman.*

For the defendant in error there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* special assistant city attorney, and oral argument by *Mr. McIntyre.*

TIMLIN, J. On December 5, 1910, the city of *Milwaukee,* by amendment of sec. 11 of an ordinance relating to elevators, forbade the operation of any elevator in the city of *Milwaukee* except by a person duly licensed for that purpose, and provided for the payment of a fee and issue of a license to persons possessing the qualifications of sobriety, industry, and efficiency. The plaintiff in error was convicted of having violated this ordinance. This writ of error to the judgment of the municipal court challenges the power of the city to enact such an ordinance, on the ground that it is not within any ordinance power delegated by the legislature to the city.

Sec. 3 of ch. IV of the city charter, containing what is popularly known as the "General Welfare Clause," provides that the common council shall have power to enact, etc., all such ordinances, etc., as they shall deem expedient for the government and good conduct of the city, for the benefit of the trade, commerce, and health thereof, for the suppression of vice, for the prevention of crime, and for carrying into effect the powers vested in said common council. "For these purposes the common council shall have authority—anything in a general law of this state to the contrary notwithstanding—

by ordinances, resolutions, by-laws, rules or regulations," (1) to regulate groceries, etc.; (2) to license, tax, regulate, suppress, and prohibit billiard tables, etc.; (3) to license, tax, regulate, suppress, or prohibit all exhibitions of common showmen, etc.; (4) to restrain or prohibit all descriptions of gaming, etc.; and so on in this form for sixty-four subsections covering a variety of subjects, none of which includes the licensing of elevator operators by any stretch of construction, unless it be subsec. 62, which reads: "To control and regulate the construction of buildings, chimneys and stacks, and to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings, stack, wall or chimney, in said city, and to declare them to be nuisances, and to provide for their summary abatement," or subsec. 63, which authorizes the common council to declare by ordinance that it shall be unlawful for any hall, theater, opera house, church, school house, or building of any kind whatsoever to be used for the assemblage of people, or for any building exceeding three stories in height to be used as a manufactory, hotel, or boarding house, or for any other purpose, unless the same is provided with ample means for the safe and speedy egress of the persons therein assembled, in case of alarm, and may require and regulate the erection of ladders, fire-escapes, standpipes, or other appliances for the escape of persons from such buildings. In ch. XIV of the charter, relating to the fire department, authority is given to the common council to prevent the dangerous construction and condition of chimneys, fireplaces, hearths, stoves, stove pipes, ovens, boilers, and apparatus used in and about any building, and to cause the same to be removed, or placed in a safe and secure condition, when considered dangerous; also to compel the owners and occupants of buildings to have scuttles in the roofs and stairs or ladders leading to the same; also to authorize the mayor, aldermen, and other officers of the city to keep away from the vicinity of any fire all idle and suspected persons and to com-

pel all bystanders to aid in the extinguishment of fires and in the preservation of property exposed to danger thereat; and generally to establish such regulations for the prevention and extinguishment of fires and for the safety and protection of persons from injury thereby as the common council may deem expedient. No other provision of the charter or of any general law of the state under which this power to license elevator operators is claimed has been brought to our attention.

General statutes of the state relative to elevators are sec. 1636—5, Stats. (Supp. 1906), being sec. 2, ch. 349, Laws of 1901, which provides that the inside walls or casings of every elevator used for the conveyance of passengers to and from the upper stories of certain described buildings shall be constructed of fire-proof material throughout; ch. 523, Laws of 1907, which prohibits any person, firm, or corporation from employing or permitting any child under sixteen years of age to have the care, custody, management, or operation of any elevator; ch. 338, Laws of 1909 (sec. 1728*f*, Stats.), to the same effect. By ch. 112, Laws of 1907 (sec. 1021*h*, Stats.), it is made the duty of an officer of the bureau of labor and industrial statistics to examine freight and passenger elevators and condemn those found to be defective and unsafe by serving written notice on the person for whom it is being operated or on his agent, or by posting such notice on the walls or in the cab of any elevator found to be in an unsafe condition. If after such condemnation the owner or person for whom the elevator is being operated shall continue the use thereof without making such repairs as will place it in a safe condition, he will be liable civilly and criminally for any physical injury caused by such use, whether such injury results in the death of the person injured or not.

One of the most effective modes of regulation is to declare the acts, conduct, business, or transaction in question unlawful unless licensed and then provide rules for the granting or revocation of such license. But this extraordinary power is

liable to be used oppressively and the possession of such power is not readily presumed. The legislature may be willing to give this power to the city in its full extent so as to enable the city to license practically all callings, or to a limited extent so as to enable the city to license dangerous callings, or it may not be willing to delegate this power at all or only with limitations and restrictions.

"Even the right to license must be plainly conferred or it will not be held to exist. Thus power to make 'by-laws relative to hucksters, grocers, and victualing shops' does not authorize the corporation to exact a license from persons carrying on such business. Nor does the general power to pass prudential by-laws, not inconsistent with the laws of the state, confer the authority to demand a license. If the charter or statute enumerates the occupations or businesses which may be regulated and licensed, the enumeration, if on the whole such appears to be the legislative intent, is exclusive, and the municipality has no power to license or regulate occupations or businesses not embraced in the enumeration." 2 Dillon, Mun. Corp. (5th ed.) § 667; *Wis. Tel. Co. v. Oshkosh,* 62 Wis. 32, 21 N. W. 828.

The power of a municipal corporation to impose license taxes on persons engaged in the pursuit of a particular occupation must be conferred by the state expressly or by necessary implication. *Cambridge v. Cambridge W. Co.* 99 Md. 501, 58 Atl. 442. To the same effect, *Wilkie v. Chicago,* 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Gray v. Wilmington,* 2 Marv. (Del.) 257, 43 Atl. 94; *State v. Smith,* 67 Conn. 541, 35 Atl. 506, 52 Am. St. Rep. 301. An ordinance requiring a license for carrying on a jewelry business in the town, declaring a fine for carrying it on without a license, is *ultra vires* where the power to pass it is not expressly or impliedly granted the town. *Mena v. Smith,* 64 Ark. 363, 42 S. W. 831. A statute giving power to license must be strictly construed, and doubt or ambiguity arising out of the language employed must be resolved in favor of the public. *Matthews*

v. Jensen, 21 Utah, 207, 61 Pac. 303. The authority of a city to impose a tax on the use of its streets by enumerated vehicles must be conferred either expressly or by necessary implication and is subject to strict construction. *Terre Haute v. Kersey,* 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298. Licenses for the purposes of regulation, granted under an exercise of the police power, must also have special legislative authorization, at least to the extent of conferring upon the city authority to regulate the particular or dangerous callings which the ordinance undertakes to license.

There is in the charter and statutes above referred to no express grant to the city of *Milwaukee* of power to license elevators or elevator operators. No such power can be implied from the "General Welfare Clause" or from the specific provisions relating to other and different subjects. The enumeration of subjects which may be regulated by license also tends somewhat to indicate a legislative intention that the city should not exercise that power over other subjects. This court cannot grant that power to the city. If the legislature has not in some way given the city that power the city does not possess it. We are satisfied that upon no fair and ingenuous construction of the charter and other relevant statute provisions can there be found any indication that the legislature intended to confer this power upon the city. If we apply the rule of strict construction upheld by the great weight of authority in such cases, this lack of authority on the part of the city is still more obvious.

By the Court.—The judgment of the municipal court is reversed, and the cause remanded with directions to dismiss the prosecution.

STATE EX REL. MILLER and another, Respondents, vs. THOMPSON, City Clerk, Appellant.

October 30—November 19, 1912.

Taxation: Board of review: Certiorari: *Jurisdictional errors: Valuation of real property: Improvements: Evidence of true value: Presumptions.*

1. The judicial review, on *certiorari*, of the action of a board of review extends only to the correction of jurisdictional errors.
2. An assessor's valuation laid before a board of review is presumed, in the absence of evidence to impeach it, to be correct; and it is also presumed that the decision of the board of review as to valuation is correct.
3. The fact, shown before a board of review, that real property is not on a paying basis as presently managed does not establish its value; nor does the fact that old buildings thereon if torn down would be worth only the wreckage establish their value as a going concern; nor does the fact that the owner will derive a larger revenue from a lease of the land for ninety-nine years, which has been made to one who will tear down the old and erect new buildings, show that the present buildings are not worth the assessor's valuation.
4. Evidence of such facts is not evidence of the market value of the property or the price which could ordinarily be obtained for it at private sale (sec. 1052, Stats.); and the affirmance by the board of review of the assessor's valuation, notwithstanding such evidence, was not a jurisdictional error.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

Daniel W. Hoan, city attorney, for the appellant.

For the respondents there was a brief by *Miller, Mack & Fairchild,* and oral argument by *James B. Blake.*

KERWIN, J. This is a proceeding by *certiorari* to review a judgment of the circuit court for Milwaukee county declaring illegal and void the action of the board of review in confirming the assessor's assessment of certain property be-

longing to the estate of John Plankinton, deceased, and setting aside the assessment and action of the board of review. The matter was brought to a hearing upon the return of the appellant, *Carl D. Thompson,* city clerk of the city of Milwaukee, and as such clerk of the board of review. The errors assigned involve the following propositions: (1) That the assessment of $2,900,000 on the real estate and improvements was improper, arbitrary, illegal, and without jurisdiction; (2) that the assessed valuation of said property for the year 1911 should have been fixed by the board of review at the sum of $2,600,000, apportioned as follows: $2,600,000 as the assessed valuation of real estate exclusive of buildings and improvements thereon, and no dollars as the assessed valuation of the buildings and improvements on said real estate.

The real controversy on this appeal is whether the board of review was justified in affirming the assessment. The property involved is the Plankinton House property in the city of Milwaukee. The assessment had been entered upon the assessment roll and delivered to the city clerk of the city of Milwaukee. The judgment of the circuit court reversed the action of the board of review and set aside the assessment. A writ of *certiorari* was issued at the instance of *H. A. J. Upham* and *George P. Miller* as trustees of the estate of John Plankinton. The assessment placed upon the property by the assessor was itemized between the real estate and improvements on the real estate as follows: Real estate $2,600,000, improvements $300,000. On the hearing it was conceded, for the purpose of the hearing at least, that the real estate exclusive of buildings was worth $2,600,000, but objection to the assessment of the additional $300,000 on account of buildings and improvements on the real estate was pressed. *George P. Miller,* one of the trustees of the Plankinton estate, testified before the board of review that he was familiar with the land in controversy, giving a description of it; that the property had been rented at best available prices, and that in

KRAWIECKI, Respondent, vs. KIECKHEFER BOX COMPANY, Appellant.

October 30—November 19, 1912.

Master and servant: Injury from breaking of unguarded belt: Feasibility of guarding: Expert testimony: Qualification of witness: Evidence: Competency: Weight and sufficiency: Questions for jury: Special verdict: Form: Appeal: Conclusiveness of verdict based on opinions: Excessive damages: Remission of part.

1. One who has had experience with machinery of the kind in question and is familiar with conditions and practices in factories in the vicinity, is qualified to testify as to the feasibility of guarding a belt which operates such machinery, and as to his experience and observation on the subject.
2. In an action for personal injuries caused by the breaking of an unguarded belt, a question propounded by defendant to its foreman as to whether any factory inspector or other official had suggested that the belt ought to be guarded, was properly excluded in the absence of any evidence that the attention of such inspectors or other officials had ever been called to the belt or to the conditions under which the machinery was operated.
3. Evidence considered and *held* insufficient to establish as a matter of law that there was no custom in wood-working factories of guarding belts under the conditions and circumstances existing in this case.
4. Evidence as to the practice in other factories with reference to guarding belts used to operate similar machinery was competent as bearing upon the question whether defendant exercised ordinary care in determining whether or not the belt in question ought to have been guarded.
5. Upon conflicting evidence as to the circumstances surrounding the plaintiff and the conditions under which he worked, the question of his contributory negligence was for the jury.
6. Where the special verdict as submitted covers in proper form all of the issues raised by the pleadings and evidence, there is no prejudicial error in refusing to submit additional questions.
7. The verdict of a jury founded solely upon the opinion of experts as to the cause of a condition (in this case the loss of sexual power), which condition is itself established only by the opinion of experts, has no conclusive weight even in the appellate court.

8. Such condition having been submitted to the jury as an element of damages upon evidence too vague and unsatisfactory, in the opinion of this court, to justify such submission, a judgment upon the verdict awarding plaintiff $2,000 is reversed and a new trial awarded unless plaintiff elects to remit all of the damages in excess of $1,000, which sum is deemed as low an amount as an impartial jury upon the competent evidence would award.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

The plaintiff was injured on March 15, 1910, in defendant's factory by the breaking of a belt on a planing machine which the plaintiff was feeding. The plaintiff was fifty-four years of age and had worked for the defendant for thirteen years. This is an action to recover damages for the injuries suffered by him by reason of the breaking of the belt.

The complaint alleges that the belt was worn and defective and was so placed that the person operating the machine could and would inadvertently come into contact with the belt and the pulley on which it ran; that the belt was not inclosed or guarded as were like belts on like machines in the city of Milwaukee and vicinity; that such inclosing and guarding could be done at but a nominal expense and so as to effectively protect from injury by a breaking of the belt the person operating the machine; that on March 15, 1910, the truck load of lumber which the plaintiff was to feed into the planer was so placed at the left of the planer, because of the crowded condition of the shop in which the plaintiff was working, that it was necessary for the plaintiff to reach over the belt which broke in order to take the lumber from the truck; and that while the plaintiff was so employed at the planer one of the belts on the machine suddenly broke and the broken end flew with great force against the plaintiff, causing the injuries. The injuries suffered are particularly described, negligence on the part of the defendant in several respects is alleged, and damages are demanded.

WISCONSIN REAL ESTATE COMPANY, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

October 31—November 19, 1912.

Appealable orders: Provisional remedy: Taxation: Construction of statutes: When "tax" includes special assessment: Payment of tax as condition precedent to action to set aside: Constitutional law: Municipal corporations.

1. This court acquires no jurisdiction to consider the merits of an order appealed from unless it was appealable; hence the question of appealability is always involved in a consideration of the merits.
2. In an action to restrain the collection of a special assessment, an order requiring the plaintiff to pay to the city treasurer the amount of the assessment as a condition of maintaining the action is appealable under subd. 3, sec. 3069, Stats. (1898), as an order granting a provisional remedy.
3. Whether or not the word "tax" in a statute includes a special assessment must generally be gathered from the context of the particular statute and the intent of the legislature as ascertained from the general scope of the act and the related acts of which it is designed to become a part.
4. There is no occasion to distinguish between general taxes and special assessments in a statute relating to tax proceedings after they have reached the stage of a tax sale, since both are included in the same sale, certificate, and deed.
5. Sec. 1210*h*—1, Stats. (Laws of 1909, ch. 295),—providing that in an action to set aside any sale of lands for the nonpayment of taxes, cancel any tax certificate or tax deed, or set aside any tax for any error or defect going to the validity of the assessment and affecting the groundwork of the tax, the plaintiff shall pay the amount of the disputed taxes to the proper officer as a condition of maintaining the action,—is general in its nature and applies to contested special assessments as well as to general taxes.
6. The subhead of the statute under which said sec. 1210*h*—1 is found contains various provisions expressly relating to and mentioning special assessments, so that its title, "General taxes; Reassessment when assessment void," is not a safe or satisfactory criterion as to the sense in which the word "tax" is used in that section.
7. Said sec. 1210*h*—1 relates to cases where, but for the errors or defects going to the validity of the assessment and affecting the groundwork of the tax, a valid tax or assessment could be laid, and not to cases where there is an absolute want of power.

8. Thus construed, it does not violate sec. 1 of art. XIV or art. V of the amendments to the federal constitution, nor secs. 1, 9 of art. I of the state constitution.

9. Where the common council of defendant city had jurisdiction, by charter, over the subject of laying drains, and plaintiff's lands were within its taxing district, but it failed to proceed according to the charter in that it ordered drains to be laid before it passed a resolution for the paving of the streets and, as to one street, failed to give notice to lotowners to construct the drain, such errors were mere errors of procedure affecting the groundwork of the tax and brought the case within the statute, so that an order to pay the assessment as a condition of maintaining an action to restrain its collection was proper.

APPEAL from an order of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Plaintiff brought action to restrain the defendants from collecting a special assessment of $7,173.12 levied against plaintiff's property, consisting of a great many lots, for the construction of house drains, claiming that the assessment was void because of the following, among other, irregularities in the proceedings had therefor: (1) the drains were ordered laid before the streets were ordered to be paved or repaired, contrary to sec. 17 of ch. VIII of the city charter; (2) as to a portion of one street no notice was given the property owners to construct the drains, or to the contractors for the construction of the same, as provided for in said section; and (3) upon information and belief it is alleged that no gas mains, water mains, nor sewers had been laid on parts of the streets. By order of the court the plaintiff was required, pursuant to the provisions of sec. 1210*h*—1, Stats. (Laws of 1909, ch. 295), to deposit the amount of the tax as a condition of maintaining the action. That section provides:

"Whenever any action or special proceeding is hereafter commenced to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain the issuing of any tax certificate or tax deed, or to set aside any tax, for any error or defect going to the validity of the assessment and

affecting the groundwork of such tax, within twenty days after the commencement of such action the plaintiff in such action or special proceeding shall pay or cause to be paid to the county, town, city, or village officer entitled to receive the same, the amount of taxes, interest, and charges levied against the said lands involved in such action, as a condition of maintaining said action."

Sec. 1210*h*—2 provides that if a reassessment is ordered the court shall, upon completion thereof, determine the amount which, according to the reassessment, the plaintiff ought justly to have paid upon the lands involved in the action or special proceeding. Sec. 1210*h*—3 provides the plaintiff shall be entitled to recover judgment for the amount, if any, he so paid in excess of the amount the court shall finally determine he ought to have paid on the land involved in the action, with interest from the date of such payment.

From the order requiring the deposit of the amount of the tax as a condition precedent to the maintenance of the action the plaintiff appealed.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *W. F. Adams.* They contended that the statute does not apply to special assessments. 8 Words & Phrases, 6873, 6874; *Hale v. Kenosha,* 29 Wis. 599; *Yates v. Milwaukee,* 92 Wis. 352, 66 N. W. 248. It does not apply to cases where the proceedings are void *ab initio. Chicago & N. W. R. Co. v. Arnold,* 114 Wis. 434, 90 N. W. 434; *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465. If it does apply in such a situation it is unconstitutional. *Wakeley v. Nicholas,* 16 Wis. 588; *Knight v. Barnes,* 25 Wis. 352; *Philleo v. Hiles,* 42 Wis. 527; *Plumer v. Marathon Co.* 46 Wis. 163, 50 N. W. 416; *Tierney v. Union L. Co.* 47 Wis. 248, 2 N. W. 289; *Lombard v. Antioch College,* 60 Wis. 459, 470, 19 N. W. 367; *Hixon v. Oneida Co.* 82 Wis. 515, 531, 52 N. W. 445; *Lombard v. McMillan,* 95 Wis. 627, 632, 70 N. W. 673; *Wilson v. McKenna,* 52 Ill. 43; *Reed v. Tyler,* 56

Ill. 288; *Weller v. St. Paul,* 5 Minn. 95; *State ex rel. Davidson v. Gorman,* 40 Minn. 232, 41 N. W. 948; *Bennett v. Davis,* 90 Me. 102, 37 Atl. 864; *Gilman v. Tucker,* 128 N. Y. 190, 28 N. E. 1040; *Lassitter v. Lee,* 68 Ala. 287.

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* assistant city attorney, and oral argument by *Mr. Williams.* To the point that the statute applies to special assessments, they cited *Dalrymple v. Milwaukee,* 53 Wis. 178, 10 N. W. 141; *Pratt v. Milwaukee,* 93 Wis. 658, 68 N. W. 392; *Levy v. Wilcox,* 96 Wis. 127, 70 N. W. 1109; *Hamar v. Leihy,* 124 Wis. 265, 102 N. W. 568; *Sheboygan Co. v. Sheboygan,* 54 Wis. 415, 11 N. W. 598. On the question of constitutionality, they cited *Wakeley v. Nicholas,* 16 Wis. 588; *Smith v. Smith,* 19 Wis. 615; *Knight v. Barnes,* 25 Wis. 352; *Hart v. Smith,* 44 Wis. 213; *Lombard v. Antioch College,* 60 Wis. 459, 19 N. W. 367; *Lombard v. McMillan,* 95 Wis. 627, 70 N. W. 673; *Christianson v. Pioneer F. Co.* 101 Wis. 343, 77 N. W. 174; *Hixon v. Oneida Co.* 82 Wis. 515, 52 N. W. 445; *Sanderson v. Herman,* 108 Wis. 662, 84 N. W. 890; *Dahlman v. Milwaukee,* 130 Wis. 468, 110 N. W. 483; *Dahlman v. Milwaukee,* 131 Wis. 427, 110 N. W. 479; *Parkes v. Milwaukee,* 148 Wis. 84, 134 N. W. 152.

VINJE, J. Is the order appealable? Neither party has raised the question, but since this court acquires no jurisdiction to consider the merits unless it is appealable, the question of the appealability of an order is always involved in a consideration of its merits. *Hyde v. German Nat. Bank,* 96 Wis. 406, 71 N. W. 659; *In re Minn. & Wis. R. Co.* 103 Wis. 191, 78 N. W. 753; *Sioux L. Co. v. Ewing,* 148 Wis. 600, 135 N. W. 130. Confessedly it is not an order affecting a substantial right made in an action which in effect determines it and prevents a judgment from which an appeal might be taken; neither is it an order affecting a substantial right made

in special proceedings. It is made in an action and, in that respect at least, partakes of the nature of a provisional remedy. The effect of this order is to impound the money in dispute and hold it for the use of defendant if plaintiff fails in the action. To that extent it grants a provisional remedy to defendants in this class of actions not enjoyed by defendants in actions generally, and therefore must be held to be appealable under subd. 3 of sec. 3069, Stats. (1898), as an order granting a provisional remedy.

Plaintiff contends that the order was improperly made, for three reasons: (1) because ch. 295 of the Laws of 1909 has no application to special assessments; (2) because, even if it does apply to them, it does not affect the instant case, where the proceedings taken by the municipal authorities are void *ab initio;* and (3) that if it does apply it is unconstitutional. While it is true that, generally, there is a clear distinction between taxes and special assessments, and between statutes relating to taxes and statutes relating to special assessments, yet the word "tax" has often been held to be broad enough to include a special assessment. *Yates v. Milwaukee,* 92 Wis. 352, 66 N. W. 248; *Sheboygan Co. v. Sheboygan,* 54 Wis. 415, 11 N. W. 598; *Dalrymple v. Milwaukee,* 53 Wis. 178, 10 N. W. 141. Whether or not the word "tax" in a statute includes a special assessment must generally be gathered from the context of the particular statute, the intent of the legislature as ascertained from the general scope of the act, and of the related acts of which it is designed to become a part. *Marine Co. v. Milwaukee, post,* p. 239, 138 N. W. 640.

It is urged that since sec. 1210*h*—1 refers only to taxes, tax certificates, and tax deeds, and does not anywhere mention special assessments, they are not included within its provisions. It should be borne in mind, however, that when tax proceedings have reached the stage of a tax sale, tax certificate, or tax deed, there is no longer any need to discriminate between general taxes and special assessments. Both are in-

cluded in the sale, certificate, and deed. Were it intended to exclude either, express mention of such exclusion would be made, otherwise the natural construction of the language is to apply it to whatever may be included in the sale, certificate, or deed, namely, to both special assessments and general taxes. In *Milwaukee* the tax sale is for both general and special taxes, and both are included in the same certificate, and the same deed is based on the sale of both. See secs. 15, 19, 24, 24*a*, and 27 of ch. XVIII of the city charter.

Attention is also called to the fact that the subhead of the statute under which sec. 1210*h*—1 falls is entitled "General taxes; Reassessment when assessment void." But under such subhead, which begins with sec. 1210*b* and ends with sec. 1210*j*, fall secs. 1210*d*, 1210*e*, 1210*f*, and 1210*h*, which relate to or mention special assessments. So the title of the subhead furnishes no safe or satisfactory criterion for determining whether or not the word "tax" in sec. 1210*h*—1 includes or excludes special assessments.

The further argument is made that since sec. 1210*h*, Stats. (1898), mentions both general taxes and special assessments, sec. 1210*h*—1, which does not mention special assessments, should be construed not to apply to them. Sec. 1210*h*—1 was created by ch. 295 of the Laws of 1909. The chapter was entitled "An act to create sections 1210*h*—1, 1210*h*—2, 1210*h*—3, and 1210*h*—4 of the statutes, relating to actions to set aside the sale of lands for taxes;" and sec. 1 thereof begins, "There are added to the statutes four new sections to read," etc. The act seems to be general in its nature, and in view of the fact that special assessments are included in the amount for which lands are sold for taxes, and in the tax certificates and tax deeds issued pursuant to such sales, no good reason is perceived why the section is to be construed to be limited only to actions seeking to set aside general taxes. In *Dalrymple v. Milwaukee*, 53 Wis. 178, 10 N. W. 141, the court construed sec. 7 of ch. 334 of the Laws of 1878 to apply

to special assessments as well as general taxes. That chapter provided:

"Every action or proceeding to set aside any sale of lands for the nonpayment of taxes, or to cancel any tax certificate, or to restrain or prevent the issuing of any tax deed or any tax certificate, or to set aside and cancel a tax deed, shall be commenced within nine months after the making of such sale, date of such certificate, or recording of such tax deed."

Such construction was based chiefly upon the ground that since special assessments go into the tax levy, and, in case of the nonpayment of the same and of the general taxes, the land charged is sold for the aggregate amount of the special assessments and general taxes, and but one certificate issued on such sale, it was not reasonable to suppose that the legislature would thus blend and intermingle the two levies or charges upon the land and provide different statutes of limitation as to each. So here in the instant case it is not reasonable to suppose that, since lands are sold for nonpayment of general taxes as well as special assessments, and the same are mingled in the tax sale, the tax certificate, and tax deed, the legislature would require, as a condition precedent to the maintenance of an action relating to general taxes, a deposit, and not require one in the case of an action seeking to set aside a special assessment. The new sections added must be held to be general in their nature and not to be limited by the language used in the previous section. No doubt the legislative idea was that as an earnest of good faith and as a guaranty that plaintiff believed in the justice of his cause, he should be required to deposit the amount in controversy as a condition precedent to the maintenance of the action. No reason, so far as we can perceive, exists why such a deposit should be required in the case of an attack upon general taxes any more than in the case of an attack upon special assessments.

Plaintiff contends that the assessment in the instant case was void *ab initio* because the city council acquired no juris-

diction to make it, and reliance is placed upon the cases of *Chicago & N. W. R. Co. v. Arnold,* 114 Wis. 434, 90 N. W. 434, and *Smith v. Sherry,* 54 Wis. 114, 11 N. W. 465, to sustain the contention. In the first case the lands were exempt from taxes, in the second case they lay outside of the taxing district. Hence the taxing officers did not have, and never could acquire, jurisdiction to tax the lands there in question. The tax was void not on account of any irregularity in the proceedings, such as a failure to perform a condition precedent or to give proper notice, but because of an absolute want of power to tax in any manner at any time. There is a wide distinction between a case where no tax can in any event be levied upon property because it is exempt or lies outside of the taxing district and a case where the property lies within the taxing district and is subject to taxation but the statutory or charter provisions have not been complied with in its levy. The former is void *ab initio* and can never be rendered valid. The latter is voidable, because of irregularities in the proceedings leading up to its levy. *Pratt v. Milwaukee,* 93 Wis. 658, 68 N. W. 392; *Schintgen v. La Crosse,* 117 Wis. 158, 94 N. W. 84; *Hamar v. Leihy,* 124 Wis. 265, 102 N. W. 568. In the instant case the council of *Milwaukee* had jurisdiction over the subject of laying drains. Ch. VIII of City Charter. The lands in question were within its taxing district. The council therefore had jurisdiction to impose the tax and of the lands sought to be taxed. It, however, did not proceed according to the provisions of the charter, in that it passed a resolution ordering drains to be laid before it passed a resolution ordering the streets to be paved, and in that, as to one street, it failed to give notice to the lotowners to construct the drains. These were errors in procedure that affected the groundwork of the tax. It will be noted that the law requiring a deposit to be made is limited to an action to set aside a tax for any *error or defect* going to the validity of the assessment or affecting the groundwork of such tax. This relates

to an error or defect in the proceedings which affects the groundwork of the tax, and it excludes a case where there is no jurisdiction to act, either because the council has no power to impose the tax or because the lands sought to be affected lie outside of the taxing district or are exempt. In *Schintgen v. La Crosse,* 117 Wis. 158, 94 N. W. 84, it was held that sec. 1210*d,* Stats. (Supp. 1906: Laws of 1901, ch. 9), providing for a reassessment when the assessment was made "without authority of law," was to be construed to apply to an irregularity in the proceedings and not to an absolute want of power. So the statute under consideration relates to a case where, but for the error or defect going to the validity of the assessment and affecting the groundwork of the tax, a valid tax could be assessed. The subsequent sections, which provide for a refund of such portion of the tax as may be held to be void, sustain this view. The case presented by the complaint is one in which the municipal authorities were empowered to impose a drain tax upon plaintiff's lots, but owing to irregularities in the proceedings they failed to follow the charter directions for so doing. There was no absolute want of power to levy the tax.

Since sec. 1210*h*—1 is construed to apply only to cases where there is a defect or error in the tax proceedings and not to cases where there is an absolute want of power to tax, the contention that it violates sec. 1 of the XIVth amendment to the constitution of the United States, and art. V of the amendments to the constitution of the United States, and secs. 1 and 9 of art. I of the constitution of this state, falls. The question of the constitutionality of the section is ruled by the decision in *Lombard v. McMillan,* 95 Wis. 627, 70 N. W. 673.

By the Court.—Order affirmed.

LEHMAN, Respondent, vs. AMSTERDAM COFFEE COMPANY and others, Appellants.

October 31—November 19, 1912.

Appeal: Undertaking: Liability of sureties: Affirmance in whole or in part: Direction for new judgment: Interest.

1. **The sureties upon a bond or undertaking on appeal are held only according to the language of their bond.**
2. **Where, on appeal, a judgment in plaintiff's favor for damages was reversed, and a new trial was ordered unless plaintiff should elect to take judgment for a certain smaller sum, in which case judgment for that sum was ordered to be rendered in her favor in the trial court, it cannot be said that the judgment appealed from was affirmed even in part; and the judgment thereafter entered upon plaintiff's election to take the smaller sum could not properly go against sureties who, by their undertaking on appeal, became responsible for payment of damages only in case the judgment appealed from were affirmed in whole or in part.**
3. **The plaintiff in such case having been given the option to take judgment for a certain sum and no more, it was error to include in the judgment interest on that sum from the date of the verdict.**

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed as to two appellants; modified and affirmed as to the other.*

For the appellants there was a brief by *Alfred Klingelhoefer* and *Lynn S. Pease,* and oral argument by *Mr. Klingelhoefer.* They cited, among other cases, *Rothgerber v. Wonderly,* 66 Ill. 390; *Huntington v. Aurand,* 67 Ill. App. 260; *Wilson v. Churchman,* 6 La. Ann. 468; *Crawford v. Kirksey,* 55 Ala. 282; *Seymour v. Gregory,* 10 Biss. 13; *Crane v. Buckley,* 203 U. S. 441, 27 Sup. Ct. 56; *Miller v. Ryan,* 13 Ohio Cir. Ct. 278, 279; *Young v. Mason,* 8 Ill. (3 Gilm.) 55; *O'Neil v. Nelson,* 22 Ill. App. 531–533; *Nofsinger v. Hartnett,* 84 Mo. 549, 559; 2 Brandt, Suretyship & G. (2d ed.) § 459; *Poppenhusen v. Seeley,* 3 Abb. Dec. 615; *Jackson v. Lawyers' S. Co.* 184 N. Y. 521, 76 N. E. 1097; *Kleiner v.*

Fidelity & D. Co. 33 Misc. 188, 67 N. Y. Supp. 216; *Chase v. Ries,* 10 Cal. 517.

For the respondent there was a brief by *Hugo J. Trost,* attorney, and *Churchill, Bennett & Churchill,* of counsel, and oral argument by *Mr. Trost* and *Mr. W. H. Churchill.* They contended, *inter alia,* that the judgment of the circuit court was affirmed wholly as to the right of recovery and partially as to the amount, and the sureties on the appeal bond are responsible for the amount affirmed. *Orr v. Hopkins,* 3 N. Mex. (Gild.) 142; *Hopkins v. Orr,* 124 U. S. 510, 8 Sup. Ct. 590; *Harding v. Kuessner,* 70 Ill. App. 355; *Harding v. Kuessner,* 172 Ill. 125, 49 N. E. 1001; *Sanders v. Rives,* 3 Stew. (Ala.) 109; 2 Cyc. 935. Within the meaning of sec. 3067, Stats. (1898), the supreme court "gave judgment against the appellant" for $1,000 damages and with costs; and that section is authority for the entry of the judgment against the appellant and sureties jointly.

WINSLOW, C. J. By reference to the case of *Lehman v. Amsterdam C. Co.* 146 Wis. 213, 131 N. W. 362, it will be seen that upon the first appeal in this case a judgment for damages in plaintiff's favor was reversed and a new trial ordered, unless the plaintiff elected to take a judgment for $1,000, in which case judgment for such last named sum was ordered to be rendered in her favor in the trial court. It now appears that upon return of the record the plaintiff duly filed her election to take judgment for $1,000, whereupon judgment was entered not only against the defendant coffee company, but also against the sureties upon the appeal bond for the sum of $1,000 with costs and with interest at six per cent. per annum from the date of the verdict, less $247.75, being the taxed costs in this court upon the former appeal. The defendant coffee company and the sureties appeal jointly from this judgment.

So far as the sureties are concerned, it is very plain that

the present judgment must be reversed. By their undertaking they agreed simply that they would pay

"all costs and damages which may be awarded against them on said appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal."

No costs or damages were awarded against them on the appeal, nor was the judgment or any part thereof affirmed. This seems too clear for argument. No part of the original judgment was left in existence after the judgment in this court upon the former appeal. The fact that another judgment might be rendered in the future by the trial court upon the exercise of a certain option by the plaintiff could not under any theory be construed as an affirmance even in part. The sureties are only held according to the language of their bond, and that language does not cover this case. They never agreed to pay a judgment rendered in the future in the trial court, but only the existing judgment or some part thereof in case of affirmance.

The judgment was, of course, proper against the main defendant, except that interest should not have been allowed from the date of the verdict, because the plaintiff was given an option to take judgment for $1,000 and no more. One year's interest at six per cent., amounting to $60, was included, and the judgment must be reduced by that amount.

By the Court.—As to the appellant sureties the judgment is reversed with costs; as to the defendant *Amsterdam Coffee Company* the judgment is modified by reducing the same in the sum of $60 as of its date, and as so modified is affirmed without costs.

SAPIENZA, Respondent, vs. WORDEN-ALLEN COMPANY, Appellant.

October 31—November 19, 1912.

Negligence: Building operations: Accidental injury: Evidence: Sufficiency: Unsupported verdict.

Defendant was engaged under a contract in erecting an addition to the power plant of an electric railway company, and had placed several large iron girders so that one end rested upon a concrete wall and the other end upon a large pile of rubbish in an adjacent excavation. While they lay in that position, apparently secure, a small girder lying near was lifted by a derrick from the rubbish pile, and the plaintiff, who with other employees of the railway company had been engaged in picking up wood and lumber from the pile and who had stood aside during the lifting of the small girder, resumed his work. Within a few minutes thereafter, the cause being otherwise unexplained, the end of one of the large girders slipped from the pile against plaintiff and broke his leg. *Held*, that so far as appears the fall of the girder was purely accidental, the cause thereof resting wholly in conjecture, and that findings by the jury to the effect that the injury was proximately caused by negligence of the defendant in lifting the small girder were unwarranted.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by the plaintiff.

The complaint alleges that the defendant, the *Worden-Allen Company,* was erecting under contract for the Milwaukee Electric Railway & Light Company an addition to the north side of its electric power plant located on Commerce street in the city of Milwaukee, and had piled heavy iron girders, weighing several tons each, in close proximity to a depression or excavation. On the 14th day of March, 1911, while the plaintiff, acting under orders and directions of a foreman of

his employer, the Milwaukee Electric Railway & Light Company, was in the act of picking up and removing wood and lumber from a pile of rubbish in the depression or excavation, one of the heavy iron girders fell from its place and rolled down the pile of rubbish against the leg of the plaintiff, causing a fracture of his left leg. The alleged charge of negligence of the railway company in furnishing the plaintiff with an unsafe and dangerous working place in permitting the iron girders to be so insecurely piled and placed that one fell and injured the plaintiff was dismissed.

The *Worden-Allen Company* is charged with negligence in that it violated its duty to the plaintiff to select a proper and safe place to pile the girders and to pile them securely and to place them in such a position that they would not fall.

A demurrer to the reception of any evidence under the complaint was overruled by the court.

The jury returned a special verdict finding that the defendant, within about five minutes of the accident, had raised a short piece of iron lying partly in the rubbish upon which the long iron column rested and which short piece of iron was only a few inches from the iron column; that the defendant was guilty of a want of ordinary care in so causing the short piece of iron to be raised; that the want of ordinary care on the part of the defendant was the proximate cause of the injury; and that the plaintiff was not guilty of any want of ordinary care which proximately contributed to his injury.

The court refused to direct a verdict for the defendant; refused to change answers to certain questions of the verdict as requested by the defendant and to order judgment on the verdict as so changed; refused to order judgment for the defendant notwithstanding the verdict, and to set aside the verdict and grant a new trial; and granted a motion for judgment for the plaintiff on the verdict.

This is an appeal from the judgment.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. F. Fawsett.*

Harry M. Silber, for the respondent.

SIEBECKER, J. The evidence in the case shows that in the construction of the addition to its Commerce street plant the railway company had thrown the rubbish accumulating during the building into an excavation five or six feet deep on the opposite side of a sixteen-foot alley from the addition. The excavation, which was the cellar to a building which had either been removed or never constructed, was surrounded on three sides by concrete walls. The rubbish thrown into the excavation extended into the excavation for ten or twelve feet on a level with the ground and then gradually declined to the bottom of the excavation.

About two weeks before plaintiff was injured the *Worden-Allen Company* had brought three iron girders or columns, between forty and fifty feet in length and about twelve by twelve inches, weighing several tons each, to these grounds, and had placed them so that one end of the girders rested on the wall surrounding the excavation and about eight feet of the other end rested on the pile of rubbish in the excavation. One girder was placed on top of another, while the third lay near by. The persons who handled them testified that they were securely and safely placed.

Shortly before the plaintiff was injured he and four other laborers employed by the railroad company were ordered by the foreman to pick up the wood and lumber from the rubbish pile in the excavation and to load it into a wagon. While they were working at this task the foreman for the defendant called to them to look out, and they stood aside while a small iron girder which lay near the large girders was lifted by a derrick from the pile of rubbish. There was evidence in plaintiff's behalf that this short girder was partly imbedded in the pile of rubbish, and that as it was raised by the derrick

the large girder was stirred and raised a little from the rubbish and that it then settled back into its former place. Immediately after the small girder had been raised the five laborers resumed their work of picking up the wood from the rubbish pile, and while the plaintiff had his back turned to the large girders the end of the separate large girder which rested on the rubbish pile slipped from the rubbish pile against the plaintiff and caused the fracture of his left leg. There is some testimony to the effect that the slipping of the large girder occurred within three minutes after the small girder had been raised.

The appellant challenges the court's ruling to the effect that these facts furnish a basis for an inference that defendant's employees were negligent in conducting these operations; that such negligence was the proximate cause of plaintiff's injuries; and that plaintiff was free from any contributory negligence. It is obvious from the evidence that the girders rested safely on the rubbish heap up to the time that the defendant's servants and the plaintiff and his fellow workmen came there to proceed with their respective tasks; that is, to raise the short iron beam or girder and to pick up wood near the foot of the pile of rubbish in the excavation. So far as the facts disclose, all parties were rightfully there and each had knowledge of what the others were doing. Can it be said that the defendant's employees were guilty of a want of care in performing the act of raising the short piece of iron, which, the jury found, proximately caused plaintiff's injury? The facts in evidence do not warrant such an inference. The claim that this operation caused the end of the girder that fell from the rubbish to rise and fall back and immediately thereafter to slide from the rubbish is based on very vague and uncertain evidentiary facts. The facts tending to support such an inference are wanting in probative force. The evidence fails to show that the girder which injured plaintiff was at all disturbed by raising of the small iron.

Nor does it appear that the operation in any way could cause it to slip from the rubbish pile. The jury's finding that it did so is a mere conjecture and is not supported by facts or by legitimate inferences therefrom. So far as disclosed, it can be asserted with equal force that the removal of rubbish by the plaintiff and others working with him disturbed the safety of the girder and caused it to slip from its resting place. What caused the girder to fall on plaintiff is shrouded in uncertainty and speculation, and there is no reasonable ground of certainty that it was the result of the acts of the defendant's employees. Furthermore, there is nothing in the record to warrant an inference that the falling of the girder was to be anticipated by any one. It appears to have been one of those unusual events which are purely accidental and unconnected with anything the plaintiff or the defendant's employees did. Under such circumstances and conditions the plaintiff has wholly failed to meet the legal burden of establishing by evidence the necessary facts tending to show any negligence of the defendant which proximately caused his injuries.

The record is reasonably clear that the plaintiff was informed of what defendant was doing in hoisting the iron and that he stepped aside from his place near the girder during the initial steps in the operation, and that he then resumed his place near it shortly before the girder fell. Every consideration of the situation suggests that he was as fully apprised of the situation and condition of things and their attendant hazards as were the defendant's employees, and knowledge of any danger from the girder slipping must be attributed to the plaintiff as well as to any of the defendant's servants. In such a view of the facts and circumstances, his act in returning to the place of danger would be inexcusable under the rule of ordinary care and would make him guilty of voluntarily exposing himself to it and the risk of injury therefrom. We are persuaded that the evidence does not

warrant the inference that the defendant's servants were guilty of a want of care which caused plaintiff's injuries and that he has failed to meet the burden cast upon him of showing a liability. The case should not have been submitted to a jury, under the rule of *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657; and *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833.

The defendant's motion for judgment should have been granted.

By the Court.—Judgment reversed, and the cause remanded with directions to award judgment dismissing the complaint.

JONES, Respondent, vs. MANGAN and others, imp., Appellants.

October 31—November 19, 1912.

Firemen relief association: Who may be beneficiary: When "mother" includes stepmother.

1. A relief association has power to designate the class from which beneficiaries may be selected in harmony with the statutes under which it is organized.
2. The constitution of a firemen relief association, organized under secs. 1987, 1988, Stats. (Supp. 1906), for the declared purpose of giving relief to the families of deceased members, provided for payment to the beneficiary named in the membership certificate, "provided that such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member;" and that in case no beneficiary should have been named the relief money should be paid "to his heirs in the following order:" widow, child, mother, father, sisters, brothers, nieces, nephews. *Held,* that the stepmother of a member was his "mother" within the meaning of the clause first quoted, and might properly be named as the beneficiary where he resided in and was a member of her family.

3. The word "mother" need not be construed as having the same meaning in both clauses of the constitution above quoted.

[4. Whether a mother by affinity, if not named as beneficiary, could take under the designation of "heirs" in the second clause, or whether the word "heirs" was there used to indicate those only who could take under the statutes of distribution, is not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is a controversy to determine the ownership of the proceeds of a benefit certificate in the Firemen Relief Association of the City of Milwaukee, defendant. The money was paid into court, and the question is whether it belongs to the plaintiff or the interpleaded defendants. The insured, Richard J. Burke, deceased, was never married. In his application for membership in the defendant association he designated plaintiff as "mother." The principal points raised by the assignments of error are (1) that the court erred in finding that deceased at the time of his death was a member of plaintiff's family; (2) that the court erred in holding that the plaintiff was such person as could be lawfully named as beneficiary; (3) in holding that the plaintiff was entitled to judgment against the interpleaded defendants for said death benefit, and that the same be paid over by the clerk of the court, and that she recover costs from the interpleaded defendants; and (4) in holding that the interpleaded defendants are not entitled to said fund.

The defendant association was organized pursuant to ch. 176, Laws of 1885, and secs. 1987 and 1988, Stats., the material parts of which are as follows:

Ch. 176, Laws of 1885, sec. 1. "The members of the paid fire department of the city of Milwaukee shall, on or before the first day of June, A. D. 1885, form an association, and shall organize, under the provisions of sections 1987 and 1988 of the Revised Statutes, and shall adopt by-laws and regulations for the government thereof, and when so organized

and the officers thereof shall have been duly elected and shall have qualified according to the by-laws of such corporation or association, the city treasurer of the city of Milwaukee shall, upon receiving written notice of such organization, and of the election and qualification of the officers of such association, pay over to the treasurer thereof, the whole amount of the fund in his hands as city treasurer, known as the 'Firemen's Relief Fund,' created and held by virtue of chapter 37 of the Laws of 1878; and thereafter such fund shall be the property of such corporation or association, and shall be held, enjoyed and disposed of by it, subject to its by-laws and regulations."

Sec. 1987. "The members of the paid fire or police department in any city heretofore or hereafter organized, who comply with the constitution and by-laws of such organization, are constituted a body corporate in such city under the name of 'The Firemen Relief Association of the City of ——,' . . . as the case may be, for the purpose of giving relief to the sick and disabled members of such association and their families and to the persons dependent upon the deceased members thereof, but no others. . . .

"*Powers.* Every such association shall have all the usual powers of a corporation necessary and proper for the purposes of its organization, and may take by gift, grant, or purchase real and personal estate, and hold, enjoy, lease, convey and dispose of the same, subject to its by-laws and regulations; and all such property and the rents, issues and profits thereof shall be devoted solely to the purposes and objects of such corporation." (Supp. 1906: Laws of 1899, ch. 145.)

The provisions of the constitution of the association relating to the purpose of the same and to beneficiaries are as follows:

"Article III. Section 1. The object of this association shall be to provide and accumulate a fund from initiation fees and dues, and other sources of income, for the purpose of giving relief to the families of deceased members, and in furtherance of this object, each member shall pay fifteen dollars ($15) annually, in advance, toward the creation and support of such fund."

"Article IX. Section 1. On evidence satisfactory to the board of trustees, of the death of a member who was in good standing at the time of his death, the sum of fifteen hundred dollars ($1,500) shall be paid to the beneficiary or beneficiaries named in his application and membership certificate; provided that such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member. Any member shall have the right to change the name of the beneficiary or beneficiaries named in the certificate by giving written direction to the president and secretary of the board of trustees to have such change made, but his signature to such written direction shall be witnessed by at least two subscribing witnesses, who must subscribe their names as such. The secretary shall notify the board of trustees at the next meeting of such change being made, and provided, that such change shall be limited to the class of beneficiaries above mentioned. No change shall be made in the name of the beneficiary except as herein mentioned, and such written direction shall be recorded on the books of the association before the same shall be effective, and a new certificate of membership shall be issued and delivered in lieu of the original, and the original destroyed. No payments shall be made by the association to any persons other than the one named in the certificate of membership at the time of the death of the member, and if none of the beneficiaries hereinbefore named exist at the time of the decease of a member in good standing, no payment whatever shall be made, nor shall there be any liability whatsoever on the part of said association to any person or persons whomsoever. In case no beneficiary shall have been named by a deceased member in the manner herein provided, and he shall at the time of his death be a member in good standing and his family or heirs entitled to relief, such relief money shall be paid to his heirs in the following order:

"First. If there be a widow, to the widow.

"Second. If no widow, to his child; or if there be more than one child, to his children in equal shares.

"Third. If there be no widow or children, to his mother.

"Fourth. If there be no widow, child or children, or mother, to his father.

"Fifth. If there be no widow, child or children, mother or

father, to his sister; and if there be more than one sister, to all of them in equal shares.

"Sixth. If there be no widow, child or children, mother or father, or sister, to his brother, or brothers in equal shares.

"Seventh. If there be no widow, child or children, mother or father, sister or brother, to his niece, or nieces in equal shares.

"Eighth. If there be no widow, child or children, mother or father, sister or brother, or niece, to his nephew, or nephews in equal shares."

"Article XIX. Section 1. This association is organized under and pursuant to the provisions of sections 1987 and 1988 of the Revised Statutes of Wisconsin and the acts amendatory thereof, and chapter 176 of the Laws of Wisconsin for the year 1885."

The court found, among other things, the organization of the defendant; that Richard J. Burke had on January 10, 1910, nominated as beneficiary, to whom the fund in question should be paid upon his death, the plaintiff; that on March 24, 1911, said Burke lost his life in a fire while a member of defendant association in good standing; that said Richard J. Burke was never married, left no widow, child, or children, and that his father had died before the death of said Richard J. Burke; that the above interpleaded defendants all survive him and are related to him as follows: *Mary Mangan, Alice Burke, Agnes Burke,* and *Anna Eberle* are his sisters of the full blood, and the interpleaded defendant *Clara Burke* is his sister of the half blood, and that the mother by blood of the said Richard J. Burke died before the death of the said Richard J. Burke; that after the death of the mother of said Richard J. Burke his father married the plaintiff, said Richard being then only about five years of age and living with his father; that the plaintiff entered upon her duties as wife of his father and as the housewife in charge of the home of the said father of Richard J. Burke; that after the death of the father of said Richard J. Burke plaintiff married one John O. Jones, of whom she is now the lawful wife and with whom she has con-

tinued to reside as his wife to the present time, and by whom she has since been and now is being supported; that at the time of his death said Richard J. Burke resided in and was a member of the household and family of said plaintiff.

The court concluded that the plaintiff was a person who could be lawfully named as beneficiary and that she is lawfully entitled to the fund and to judgment against the defendants for said fund, and that she have her costs.

Judgment was entered accordingly, from which this appeal was taken.

For the appellants there was a brief by *Roethke & Affeldt,* attorneys for interpleaded defendants, and *Ernst von Briesen,* guardian *ad litem* for *Clara Burke,* and oral argument by *Geo. A. Affeldt.*

For the respondent there was a brief by *W. B. Rubin,* attorney, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

KERWIN, J. Under the articles of incorporation of the defendant, upon the death of a member in good standing the sum of $1,500 shall be paid to the beneficiary or beneficiaries named in his application and membership certificate, provided such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member.

The statute set out in the statement of facts, sec. 1987 as amended (Supp. 1906: Laws of 1899, ch. 145), provides that "The members of the paid fire or police department in any city heretofore or hereafter organized, who comply with the constitution and by-laws of such organization, are constituted a body corporate in such city under the name of 'The Firemen Relief Association' . . . for the purpose of giving relief to the sick and disabled members of such association and their families and to the persons dependent upon the deceased members thereof, but no others . . ."

Art. XIX of the constitution of defendant provides that the association is organized under the statutes, secs. 1987 and 1988, and acts amendatory thereof, and ch. 176 of the Laws of Wisconsin for the year 1885. There can be no doubt but that the association had the power to designate the class from which a beneficiary could be selected in harmony with the statutes referred to. 29 Cyc. 109; *Tepper v. Supreme Council Royal Arcanum,* 59 N. J. Eq. 321, 45 Atl. 111.

Sec. 1, art. III, of the constitution heretofore set out provides for the relief of families of deceased members, and sec. 1 of art. IX designates the class, and in this class "mother" is designated as a beneficiary. Richard J. Burke, a member of defendant association, named the plaintiff, his stepmother, as beneficiary in his application, and the question arises whether she comes within the class designated as beneficiaries. The question has given us some trouble, and we do not regard it easy of solution. On the part of the appellants it is argued with much force that the word "mother" in the articles of association means mother by blood, therefore stepmother is excluded, and that this is the only construction that will harmonize all parts of the articles of association where the word "mother" is used, and that it is the natural and logical construction and the one which should be adopted, therefore the appointment of plaintiff as beneficiary was void because she could not take as beneficiary, consequently the interpleaded defendants, heirs of deceased, take the fund under the provisions of the articles to the effect that the heirs take in the absence of an appointment by the member.

On the part of the respondent it is insisted that the plaintiff takes as a member of the family of deceased, therefore she was properly named as beneficiary. As appears from the statement of facts, the court found that at the time of his death Richard J. Burke resided in and was a member of the household and family of the plaintiff, and that plaintiff was properly named as beneficiary of deceased and so remained as such.

Manifestly, upon the established facts, plaintiff, stepmother of deceased Richard J. Burke, was a member of his family. 3 Words & Phrases, 2673–2688 and notes; *Carmichael v. Northwestern M. B. Asso.* 51 Mich. 494, 16 N. W. 871; *Hosmer v. Welch,* 107 Mich. 470, 67 N. W. 504. But it is argued by counsel for appellants that the word "family" should have a narrow construction in view of other provisions of the articles of association, and should be limited to those only who take under the statute of distribution. This contention is grounded upon the fact that art. IX specifically provides who the beneficiaries shall be, "mother" being one, and that in case no beneficiary shall have been named in the manner provided and deceased at the time of his death be a member in good standing and his family or heirs entitled to relief, such relief money shall be paid to his heirs in the following order:

"First. If there be a widow, to the widow.

"Second. If no widow, to his child; or if there be more than one child, to his children in equal shares.

"Third. If there be no widow or children, to his mother. . . ."

Now under this second classification it is argued that the mother must be an heir, and that the word "mother," according to proper rules of construction, should have the same meaning in each classification of art. IX of the constitution, therefore "mother" mentioned in the first class under art. IX must be a mother by blood and capable of inheriting, since the second class, where no beneficiary is named, gives the property to heirs only in the same order and in the identical language as to beneficiaries as the first class. The conclusion of appellants' counsel is that, since a stepmother cannot take under the statutes of distribution, she is not a mother within the meaning of the articles of association. The court, however, has arrived at the conclusion that the construction contended for by counsel for appellants is too narrow in view of the purpose of the statute and the articles of incorporation, namely, the relief of families of deceased members. We

think that a mother who can be named includes a mother by affinity who is a member of the family. Without going into any extended discussion of the reason of the rule, it is obvious that in many cases the stepmother may have strong claims upon the child whom she cares for during minority, and no reason appears to us why such child should not have the right, under the articles of association in this case, to make the stepmother the object of his bounty. The following authorities bear upon the question: *Renner v. Supreme Lodge B. S. Ben. Soc.* 89 Wis. 401, 62 N. W. 80; *Simcoke v. Grand Lodge A. O. U. W.* 84 Iowa, 383, 51 N. W. 8. Nor do we think that the word "mother" must necessarily have the same meaning in the first and second classes named in art. IX. In the first class there is no restriction, either express or implied, but on the contrary, in view of the construction which should be given the articles of association to carry out the manifest corporate purpose of the defendant association, a mother by affinity, who is a member of the family, may be named. In the second class the right to take the benefit seems by words to be limited to heirs. But it is only in case of failure to name a beneficiary that this classification providing that the fund shall go to the heirs is operative. There is no restriction where the member names a beneficiary, only that he keep within the class specified. True, as argued by counsel, the word "mother" is used in each classification, but we cannot think that the proper rule of construction requires that the word "mother" in the first class must necessarily mean mother by blood, capable of taking under the statutes of distribution of this state. Appellants place reliance upon *Koerts v. Grand Lodge Hermann's Sons,* 119 Wis. 520, 97 N. W. 163, which holds that the same meaning must be given the same word in different sections. There the question was as to the meaning of the word "survivors" when used to designate the "survivors" of a member in a benefit society, and of course the meaning of the word was necessarily the same when used in the

same connection in various sections. But there is no rule of construction requiring the same meaning to be given to the same word used in different connections.

Whether a mother by affinity and a member of the family, though not named, could take under the designation of "heirs" as used in the second class, we need not and do not decide. Nor do we decide whether the word "heirs" in that connection was used to indicate that those only who took under the statutes of distribution could take the fund in case of failure by the member to name a beneficiary.

By the Court.—The judgment of the court below is affirmed.

MILWAUKEE TRUST COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

November 1—November 19, 1912.

Municipal corporations: Streets: Change of grade: Measure of damages: Special verdict: Unnecessary question: Evidence: Instructions to jury: Appeal: Harmless errors: When verdict set aside.

1. The true measure of damages to abutting property for a change in the grade of a street is the difference in the market value of the property immediately before and immediately after such change.
2. The submission to the jury of an improper question relating to a mere evidentiary fact is not a material error if, without such question, there is a complete special verdict. The answer to such surplus question may be disregarded.
3. In an action involving assessment of damages for a change in the grade of a street, evidence relating to the loss of rentals and to the cost of restoration is proper as bearing on the question of depreciation, but neither can be made an independent ground of recovery.
4. The evidence as to the cost of restoration should be confined to a time at or about the date of the assessment.

5. Error in admitting evidence of the cost of restoration four years afterward was not prejudicial where questions as to the market value before and after the change of grade were properly submitted and answered in the special verdict and such answers were supported by other competent and sufficient evidence; even though, in answer to another question, improperly submitted, the jury found the cost of restoration to be precisely the same amount as the difference in the market value.
6. In all inquiries relating to value, where there is no known, regular, and continuous market, such as exists in the exchanges or such as exists generally for consumption goods, a wide range of investigation is permitted and the rules governing the admission of evidence are liberal.
7. In an action involving assessment of damages for a change in the grade of a street, it would have been proper to instruct the jury to the effect that the testimony of witnesses who measured distances and made memoranda thereof at the time, if otherwise credible, is of greater weight than the evidence of witnesses who merely give their recollection based on estimates of such distances; but the refusal to give such an instruction is not ground for a reversal where the evidence related to a matter not directly in issue, but forming one of the bases for the estimates of value or of damages made by the witnesses, and those estimates also rested upon actual inspection of the property.
8. Upon appeal it is not sufficient ground for setting aside a verdict that it is against the weight of evidence, where there is some credible evidence to support it and it does not appear to be perverse.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *Charles E. Monroe.*

TIMLIN, J. This is an action which originated in an assessment of damages for change of grade made by the board of public works of the city of *Milwaukee* in 1904. The ac-

tion is therefore in substance and effect an assessment of damages. Upon appeal from that tribunal to the circuit court there was a special verdict as follows:

"(1) What was the reasonable market value of plaintiff's property immediately before the grading of the street in front thereof? *A.* $3,000.

"(2) What was the reasonable market value of plaintiff's property immediately after the street in front thereof was filled to the newly established grade? *A.* $2,133.06.

"(3) What was the reasonable cost of putting plaintiff's property in substantially the same condition relative to the newly established grade, as it was in before such change of grade? *A.* $866.94."

The respondent had judgment for the last named sum and costs and the city appeals to this court. Of appellant's assignments of error, 1, 2, 3, 4, 7, and 8 relate directly or indirectly to the matter covered by question 3 of the special verdict, and remotely, if at all, to questions 1 and 2, namely, error in admitting evidence of loss of rentals; in refusing to strike out evidence of cost of raising house at a period four years after the assessment; in submitting question 3 to the jury; in refusing to submit question as to the necessity of raising houses and refusing to instruct the jury so as to exclude loss of rentals; in refusing to instruct that because of said defect in the evidence of cost of restoration question 3 should be answered "nothing." But question 3 of the special verdict was improper and the verdict is complete without it. It relates to an item of evidence and should not have been submitted. The true measure of damages was the difference in value as established by questions 1 and 2. This damage might exceed or fall short of or be identical with the cost found by the answer to question 3. Evidence relating to the loss of rentals after the assessment might have some bearing on the question of depreciation, but was not and could not be put forward as an independent ground of recovery. Evidence of the reasonable cost of putting the property in sub-

stantially the same condition relative to the new grade as it was in relative to the former grade is also competent as bearing upon the ultimate inquiry and true measure of damages. This cost should be estimated as of a time at or about the date of the assessment, otherwise it loses its value as evidence, because the cost of labor and material may not be the same four years later as it was at the time of the assessment.

While the court erred in refusing to strike out such evidence we are not convinced that the error was prejudicial in a case like this, in which there was other and direct evidence of the difference between the reasonable market value before and after the change of grade. Omitting question 3, we have a complete special verdict upon the question of damages. The surplus question 3, relating to an item of evidence, may be disregarded. The tendency of a special verdict is not always to promote reversals. In many cases it has the contrary effect. For illustrations: The erroneous admission of evidence bearing upon a question of the verdict found in appellant's favor and having no bearing upon questions found against appellant cannot be considered prejudicial. *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 504, 122 N. W. 1059. An erroneous admission of evidence irrelevant to the issues finally submitted to the jury is not prejudicial. *Samson v. Ward,* 147 Wis. 48, 50, 132 N. W. 629. If the special verdict in some reasonable form covers all the material issues, other immaterial answers, or answers that do not cover distinct issues, will not be considered reversible errors. *Twentieth Century Co. v. Quilling,* 136 Wis. 481, 485, 117 N. W. 1007. The appellant cannot complain of questions submitted differing in form but not in substance from those requested by him. *Redepenning v. Rock,* 136 Wis. 372, 379, 117 N. W. 805. Where the special verdict covers all the issues it is not reversible error to refuse to submit other questions requested. *Berndt v. Cudahy,* 141 Wis. 457, 459, 124 N. W. 511; *Anderson v. Sparks,* 142 Wis. 398,

405, 125 N. W. 925. A judgment will not be reversed for an error in submitting one question of the special verdict if the remainder of the verdict supports the judgment. *Johnson v. C. & N. W. R. Co.* 64 Wis. 425, 25 N. W. 223. Substance, not form, is considered. *John R. Davis L. Co. v. Home Ins. Co.* 95 Wis. 542, 70 N. W. 59; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377. So, instructions which are erroneous as to one of the issues submitted by a question of the special verdict are not ground for reversal if other questions fixing the liability of appellant on another ground were properly submitted. *Kortendick v. Waterford,* 142 Wis. 413, 417, 125 N. W. 945. So, also, errors in rulings upon certain questions of the special verdict become immaterial or nonprejudicial if there is no error upon the trial of other issues which determine the liability of appellant and are submitted by separate questions of the verdict. So, also, where one question of a special verdict is defective but the subject intended to be covered thereby is properly covered by other questions in such verdict which were found against the appellant, the submission of the defective question will not warrant reversal. *Brown v. Milwaukee E. R. & L. Co.* 148 Wis. 98, 133 N. W. 589. These illustrations might be greatly extended by a more critical and comprehensive study of the decisions of this court.

It is contended that in the instant case the jury found the damages by subtracting from the former market value of the property in question the amount of the cost of restoration fixed by their answer to question 3, and this is inferred from identity in amount of cost of restoration and amount of difference in value. It is quite conceivable, however, that the jury was convinced from other competent evidence before it that the depreciation in value was exactly equal to the cost of restoration. The jury might have arrived at the difference between the first and second answers by cutting down the estimates of respondent's witness to an amount exactly equal

to the cost of restoration four years later, if they did not accept such cost as in any wise controlling, but took it merely as an arbitrary figure that corresponded quite closely with what they considered a fair discount upon the testimony of respondent's witness relative to the difference in market value before and after the change of grade. It does not appear to us affirmatively that the jury here committed an error which was prejudicial to appellant. The answers to questions 1 and 2 involved the ascertainment of what is called, for want of a better name, "market value" before and after the grading. The word "value" stands for one of the most difficult and elusive mental concepts, and the ascertainment of what is called market value, in a case where there is no open market recording numerous transactions of sale or barter and responding automatically to the relative quantities of demand and supply, is still more difficult. For this reason courts have adopted as the equivalent of market value "what the property is worth or will sell for as between one who wants to purchase and one who wants to sell." *Esch v. C., M. & St. P. R. Co.* 72 Wis. 229, 231, 39 N. W. 129; 5 Words & Phrases, 4383 to 4388 and cases. These attempts at definition disclose the difficult and comprehensive nature of the inquiry. *Maxon v. Gates,* 136 Wis. 270, 290, 116 N. W. 758.

For these reasons, in all inquiries relating to value where there is no known, regular, and continuous market such as exists in the exchanges or such as exists generally for consumption goods, a wide range of investigation is permitted, and the rules governing the admission of evidence are liberal, especially where the damages are submitted in the form of a special verdict properly covering the correct measure of damages. *Andrews v. Youmans,* 82 Wis. 81, 52 N. W. 23; *Allen v. C. & N. W. R. Co.* 145 Wis. 263, 129 N. W. 1094; *Stolze v. Manitowoc T. Co.* 100 Wis. 208, 75 N. W. 987; *Moore v. C., M. & St. P. R. Co.* 78 Wis. 120, 47 N. W. 273.

If in the instant case we were to grant technical error in the several assignments, such errors would have no further effect than to destroy, impair, or render improper the third question and answer of such verdict. The same observation applies to the alleged error in refusing to charge the jury to the effect that question 3 of the verdict should be answered "nothing." Give it that answer now or strike it out entirely and the judgment rests supported by the answers to questions 1 and 2.

It is further contended that there was error in refusing to instruct the jury, at the request of appellant's counsel, that in determining where the clear preponderance of the evidence is they were not to exclude or disregard the direct, positive evidence of witnesses who made measurements as to certain facts in dispute in this case, and so disregarding such evidence find the fact to be in accordance with the testimony of witnesses who, without making such measurements, merely estimate or give their judgment of the same, as the testimony of witnesses who have measured distances and made memoranda of such measurements at the time of taking, if otherwise credible, is of greater weight than the evidence of witnesses who merely give their recollection based on estimates of such distances. This instruction was proper and might well have been given. *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238; *Wanta v. Milwaukee E. R. & L. Co.* 148 Wis. 295, 134 N. W. 133. We are not convinced that its refusal injuriously affected the appellant. The instruction related to a matter not directly in issue, but forming one of the bases for the estimates of value or of damages made by the witnesses. These estimates also rested upon actual inspection of the property by the witnesses. In such case, while it would have been better to give the instruction, we cannot say in an inquiry of value that it was prejudicial error to refuse it.

The fifth and sixth errors assigned refer to requests for instructions which might properly have been allowed. But their refusal was not prejudicial error. It is contended in

support of the ninth assignment of error that the verdict is against the weight of evidence, and in support of the tenth assignment of error that it is perverse. It is not sufficient ground for setting aside the verdict of a jury in this court that it is against the weight of evidence, and we find no perversity in it.

There appears to be in this record some credible evidence to sustain the verdict, and although we might not reach the same result on the evidence as did the jury, we cannot under such circumstances, where the trial court has denied a motion for a new trial, interfere with the verdict. *Laville v. Lucas,* 13 Wis. 617; *Smith v. Wallace,* 25 Wis. 55; *Kearns v. Thomas,* 37 Wis. 118; *Kaufer v. Walsh,* 88 Wis. 63, 59 N. W. 460; *Janssen v. Lammers,* 29 Wis. 88; *Dorwin v. Hagerty,* 137 Wis. 161, 164, 118 N. W. 799. The circuit court in granting or refusing a new trial, it is needless to say, acts upon a different rule.

By the Court.—The judgment of the circuit court is affirmed.

FLINT and others, Respondents, vs. WISCONSIN TRUST COMPANY and others, Appellants.

November 1—November 19, 1912.

Wills: Construction: Intent: "Heirs:" Accurate use of word presumed: Vested and contingent estates.

1. **Unless a contrary intention appears by clear and conclusive evidence, the word "heirs" in a will will be given its technical and correct meaning, as referring to those persons who, at the death of the ancestor named, would be entitled to inherit his real estate under the laws of descent.**
2. **Thus, in a devise of land to the testator's sister "for life, remainder to her heirs in fee," the word "heirs" is *held* not to have been used to denote "children" or "heirs apparent."**

3. It is not accurate to speak of a designated person as the heir of another person who is living; but it is accurate to speak of the heirs of a living person when reference is intended to be made to those unknown persons entitled to inherit his real property at his death under the laws of descent.
4. The rule of law which favors vested estates rather than contingent ones is practically a rule of construction which may have controlling weight in a close or doubtful case, but cannot be invoked to defeat the intent of the testator where that intent is reasonably clear.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an action of ejectment. Plaintiffs and defendants claim title from a common source, to wit, the will of M. B. Kneeland, who died July 1, 1875, seised in fee simple of the premises involved in this suit. The will, omitting purely formal parts, is as follows:

"First. I direct that as soon as is convenient after my decease all my just debts be paid.

"Second. I will and direct that as soon as it can be conveniently done after my decease, my executor erect upon the lots in Forest Home Cemetery, of which my father died seized, a family monument and that he otherwise improve said lots to and at a cost not less than two thousand dollars nor more than three thousand and in such manner as to my said executor consulting with my sisters shall see fit.

"Third. I will and direct that as soon after my decease as my personal estate will reasonably admit my said executor erect upon the west fifty-five feet of Lot No. Twelve in Block No. Fifty-eight in the Fourth Ward of the city of Milwaukee, on the northeast corner of Spring and West Water streets a brick block to be called "Kneeland's Block," covering the whole of my ground there, and to have the name of the block set in front in cut stone, the said block to cost not less than fifteen nor more than twenty thousand dollars. If my personal estate shall not be sufficient thereto at the time my estate shall be settled or ready for settlement; other than touching (?) the above direction then I direct that the same be put

at interest until it with the rents of such lot and such sum as my sister, Sarah O. Chandler, shall see fit to add thereto, shall be sufficient to erect such block.

"Fourth. I give and bequeath the said west fifty-five feet of said Lot No. Twelve in Block No. Fifty-eight, in the said Fourth Ward, corner of Spring and West Water streets, subject to the accumulation of rents aforesaid, to my sister Sarah O. Chandler, for life, remainder to her heirs in fee.

"Fifth. I give and bequeath to my sister Ellen C. Sexton all my interest in and to Lots Nos. Five and Six, in Block No. Twenty-two (22) in the Seventh Ward of the city of Milwaukee, to have and to hold to herself, her heirs and assigns forever.

"Sixth. I give and bequeath to my sister Frances Flint all my interest in Section Sixteen in Township No. Seven, north of Range Twenty-two (22) East, to have and to hold to herself, her heirs and assigns forever.

"Seventh. I will and direct that my executor convert all the rest and residue of my real estate of which I shall die seized into money, selling the same at such time and in such manner as to him shall seem fit and proper, and upon such terms of sale as to him shall seem fit and if he sell upon credit then such credits to be divided as hereinafter provided. After my said executor shall have converted all my real estate into money, paid my debts and constructed and erected such monument, then I will and direct that he divide the proceeds thereof equally between my said sisters, their heirs and legal representatives, share and share alike.

"Eighth. I will and direct that all the rest and residue of my personal estate to which resort is first to be had to erect said monument and which shall remain after the erection of said block shall be divided equally among my sisters aforesaid and their legal representatives, the heirs and representatives taking the share which would have gone to their ancestor.

"Ninth. I appoint my brother-in-law, Walter S. Chandler, executor of this my last will and testament."

This will was executed on July 23, 1874, and Kneeland died July 1, 1875, childless. At the time the will was executed one of the sisters of the testator was the wife of Walter S. Chandler of Waukesha and also the mother of two children,

Ralph Chandler, born July 16, 1861, and B. K. Chandler, born October 22, 1872. Both of these children were living when the will was made and when the testator died. Walter S. Chandler, the husband of Sarah, died on December 27, 1896; Ralph Chandler died August 12, 1904, leaving no issue, but leaving a widow surviving him, as well as his mother and one brother, B. K. Chandler. B. K. Chandler died June 17, 1907, unmarried and childless, leaving his mother surviving him. The mother, Sarah O. Chandler, died August 4, 1911. In 1891 Sarah O. Chandler, Ralph Chandler, and B. K. Chandler, an infant, by W. S. Chandler, his special guardian, contracted to sell the property in question here to Fred Pabst for the sum of $150,000, $50,000 of which amount was to be paid in cash and the balance of said sum in deferred payments.

The plaintiffs in the present suit are the nephews and nieces of Sarah O. Chandler, deceased, and the controversy arises over the fourth paragraph of the will, the plaintiffs claiming that Sarah O. Chandler took a life estate only in the property and that the remainder over descends to them as her heirs at law. The defendants, on the contrary, assert that it was the intention of the testator to give a life estate in the property to Sarah O. Chandler, with the remainder to her then living children, and that the word "heirs" as used in said paragraph 4 means "heirs apparent" or children. The trial court awarded judgment in favor of the plaintiffs, and from such judgment the defendants appeal.

Geo. D. Van Dyke, of counsel, for the appellants.

For the respondents there was a brief by *Miller, Mack & Fairchild* and *Woodward & Lees,* and oral argument by *Geo. P. Miller* and *G. M. Woodward.*

BARNES, J. In construing a will the vital thing is to ascertain what the testator meant, and his intention must be gathered from the instrument as a whole, read in the light of the circumstances which surrounded him when it was made.

Allen v. Boomer, 82 Wis. 364, 52 N. W. 426; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201; *Kavanaugh v. Watt,* 143 Wis. 90, 126 N. W. 672; *Ohse v. Miller,* 137 Wis. 474, 119 N. W. 93. But construction of a will does not begin "until uncertainty of sense is pretty clearly apparent." *Holmes v. Walter,* 118 Wis. 409, 413, 95 N. W. 380. "We must have ambiguity before we can enter upon the field of interpretation or construction." *In re Moran's Will,* 118 Wis. 177, 196, 96 N. W. 367.

While adjudicated cases may be and sometimes are helpful in aiding in the construction to be placed on wills, it is seldom that the language used and the surrounding circumstances are so much alike in the case of two wills that the decision in reference to one establishes a precedent which controls the decision as to the other. *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169; *Becker v. Chester,* 115 Wis. 90, 118, 91 N. W. 87, 650; *Otjen v. Frohbach,* 148 Wis. 301, 309, 134 N. W. 832.

If the word "heirs" used in the fourth paragraph of the will is to be given its technical and correct meaning, then it refers to those persons who would be entitled to inherit Mrs. Chandler's real estate upon her death under the law of descent. This is conceded. In the case of *In re Cowley's Will,* 120 Wis. 263, 266, 97 N. W. 930, 98 N. W. 28, it is said that the words "my lawful heirs" are not ambiguous and that the authorities overwhelmingly "support the rule that reference in a will to *heirs* or *legal heirs* of the testator means the persons who at his death are by law entitled to inherit the realty; that such significance can be overcome only by clear and conclusive evidence of a different intent or meaning."

"The word 'heirs' in a will primarily is used in its legal or technical sense, and, unless the context shows a contrary intention, must be construed as meaning all those who, in case of intestacy, would be entitled by law to inherit on the death of the testator or ancestor named." 40 Cyc. 1459.

The following authorities are to the same effect: 2 Underhill, Wills (1900 ed.) § 607; Page, Wills, § 556; *McLean v. Williams,* 116 Ga. 257, 42 S. E. 485; *Cushman v. Horton,* 59 N. Y. 149; *Hoover v. Smith,* 96 Md. 393, 54 Atl. 102; *Jarboe v. Hey,* 122 Mo. 341, 353, 26 S. W. 968; *Appeal of Dodge,* 106 Pa. St. 216, 220, 51 Am. Rep. 519; *McCarthy v. Marsh,* 5 N. Y. 263, 275; *Phillips v. Carpenter,* 79 Iowa, 600, 44 N. W. 898; *Croom v. Herring,* 11 N. C. 393; *Barclay v. Cameron,* 25 Tex. 232, 242; *Brooks v. Evetts,* 33 Tex. 732, 742; *Lavery v. Egan,* 143 Mass. 389, 9 N. E. 747; *In re Donahue's Estate,* 36 Cal. 329, 332; *Ewing v. Barnes,* 156 Ill. 61, 40 N. E. 325, 327; *Howell v. Gifford,* 64 N. J. Eq. 180, 53 Atl. 1074, 1077; *Dukes v. Faulk,* 37 S. C. 255, 16 S. E. 122, 127; *Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 251, 30 Am. Rep. 554; *Cook v. First Univ. Church,* 23 R. I. 62, 49 Atl. 389, 390; *Nye v. Grand Lodge A. O. U. W.* 9 Ind. App. 131, 36 N. E. 429, 436; *Lincoln v. Perry,* 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Olney v. Lovering,* 167 Mass. 446, 45 N. E. 766; *Merrill v. Preston,* 135 Mass. 451, 457; *Lawton v. Corlies,* 127 N. Y. 100, 27 N. E. 847, 848; *Proctor v. Clark,* 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721, 724; *Alexander v. Wallace,* 76 Tenn. (8 Lea) 569, 570; *Kelley v. Vigas,* 112 Ill. 242, 245; *Shaw v. Robinson,* 42 S. C. 342, 20 S. E. 161.

That a case might arise where the word "heirs" would be construed to mean children or heirs apparent may be admitted. But before a court should say that the word should not have its accurate and legal meaning, it should clearly appear that the testator did not use the word advisedly and that he intended to say something different from what he did say.

Appellants' contentions are that the word "heirs" is used in a popular sense to denote "heirs apparent," as well as in a technical sense; that it is not accurate to speak of heirs of a living person if it is the intention to use the word in a technical sense, while it is if the word is used as meaning heirs

apparent or children; that in articles 5 and 6 of the will the testator used the word "heirs" in its technical sense and in articles 7 and 8 he used the word in its popular sense, showing that he used the word in its popular as well as in its technical sense; that the language of the fourth article of the will imports an immediate and absolute gift of the remainder to the heirs of a person recognized in and by the will as then living; that conditions were such when the will was made that the testator evidently intended to make a devise of a life estate to Mrs. Chandler and vest the remainder in her children; and, finally, that the law favors vested rather than contingent remainders, and, where there is reasonable doubt as to which a testator intended to create, the doubt should be resolved in favor of the vested remainder.

None of these reasons, considered singly, is very persuasive, and all of them combined are not very convincing. A large number of cases are cited by appellants wherein the word "heirs," when used in the deed or will under consideration, was held to mean children. In some of those cases the court held that, taking the instrument as a whole and construing it in the light of the circumstances which surrounded the party who made it, it was manifest that the word *heirs* was intended to mean *children*. In many of them such a construction was necessary in order to hold the grant or devise valid. In some of the cases relied on there was perhaps fair room for doubt as to what the intention of the testator or grantor was.

Starting with the propositions established in this court, that the meaning of the word "heirs" when used in a will is not ambiguous, and that the evidence must be clear and conclusive to show that the testator made an inaccurate use of the word, there is little to indicate that the trial court did not correctly construe the fourth article of the will.

The obvious impression which a reading of the will conveys to the mind is that the testator intended that Mrs. Chandler should have a life estate in the property, and that after she

was through with it it should go to those who would inherit any real estate she might own if she died intestate. It is not accurate to speak of a designated person as the heir of another person who is living, although it is customary enough to do so. It is accurate to speak of the heirs of a living person when reference is intended to be made to those unknown persons entitled to inherit his real property at his death under the laws of descent. Neither are we impressed with the contention that the word *heirs* is used in its popular rather than in its technical sense in articles 7 and 8 of the will, or that it purports to make an immediate gift of the remainder. The rule of law which favors vested estates rather than contingent ones at the present time is practically a rule of construction that may have controlling weight in a close or doubtful case, but cannot be invoked to defeat the intent of the testator where that intent is reasonably clear. The fact of the matter is, the will appears to be a pretty plain and easily understood document, about the intent and meaning of which there is not very much doubt. Perhaps able counsel, in view of what has transpired, could use more apt and less ambiguous language than that used, but the draughtsman without the benefit of hindsight managed to draw a document which is far from being cryptic in character.

By giving the word *heirs* its technical legal meaning, we have a will that makes an entirely sane and reasonable disposition of the property. The testator wanted to specially provide for his sister, Mrs. Chandler, probably because her husband was not as well off as were the husbands of his other sisters. He took care of her by giving her a life estate in the property and by providing that a building should be erected thereon from which she should draw the rents. If she left children surviving her, they would of course take the fee; if not, then the estate was to go to Mrs. Chandler's heirs, who, as it turned out, would also be the lawful heirs of the testator had he died without leaving a widow or issue at the time

Mrs. Chandler died. It is true that under the construction which we adopt a contingency might have arisen whereby the property would have gone to Mrs. Chandler's husband, and it may be said that the testator desired to have his property go to his own blood relations. This contingency, however, would be just as likely to happen under the construction contended for by appellants.

Although the case is important, we deem it unnecessary to prolong the discussion. The case involves practically a single question. If the testator used the word *heirs* when he meant *children,* the judgment should be reversed, otherwise it should stand. The plain import of the language used is that the testator did not mean children. If its ordinary and usual sense is given to the language used, the circuit court reached a correct conclusion. To our minds the case is quite barren of circumstances which would logically lead to the conclusion that the testator meant *children* when he used the word *heirs* in the fourth article of his will.

By the Court.—Judgment affirmed.

MARINE COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

November 1—November 19, 1912.

Taxation: Recovery of illegal "tax:" Special assessments not covered by statute: Money had and received: When action will not lie.

1. In sec. 1164, Stats. (1898),—providing for an action by the taxpayer to recover any unlawful tax levied and collected from him,—the word "tax" relates only to general taxes and not to special assessments.
2. No common-law action lies against a city to recover, as for money had and received, the amount of a special assessment paid un-

der protest, where before the action was commenced the city treasurer had, pursuant to law, paid over the amount so collected to the holder of the improvement certificate.

3. The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of payment of the money, but also the consequent enrichment of the defendant by reason of having received the same.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Reversed.*

Action under sec. 1164, Stats. (1898), to recover the sum of $286.11 paid the defendant city, under protest, for a special assessment against plaintiff's property, which assessment, it is claimed, was void for certain irregularities therein not here necessary to specify. Sec. 1164 is as follows:

"Any person aggrieved by the levy and collection of any unlawful tax assessed against him in any town, city or village may have and maintain an action against such town, city or village for the recovery of all money so unlawfully levied and collected of him. And every such action to recover back any such money hereafter paid shall be brought within one year after such payment and not thereafter; and in case any such town, city or village shall have paid a judgment recovered in any such action, after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury; and the county treasurer shall also be allowed by the state treasurer the amount of state tax so illegally collected and paid in his settlement with the state treasurer next after the recovery of such judgment and collection thereof; and if any part of such unlawful tax shall have been paid over to any school district before the payment of such judgment such town shall charge the same to such district, and the town clerk shall add the same to the taxes of such school district in the next annual tax; provided, however, that no action shall be maintained under the provisions of this section unless it shall

be made to appear to the court that the plaintiff has paid more than his equitable share of such taxes."

A special assessment certificate was issued to the contractor pursuant to sec. 13 of ch. VII of the city charter. Said section provides that the certificate may be paid to the city treasurer; that the city treasurer shall receive the amounts paid on such certificates and hold the same for the benefit of the owners thereof, and such owners shall be entitled thereto on producing and surrendering the certificate to be canceled. Plaintiff paid the sum in question on the 29th day of January, 1910. On the 17th day of February of the same year the city treasurer paid the amount to the holder of the certificate, who delivered it up to be canceled pursuant to the charter provision. This action was begun January 11, 1911. At the close of the plaintiff's case the defendant moved, alternatively, for a nonsuit, or, if the court was of the opinion that the defendant was not entitled to a nonsuit and that the tax and the assessment upon which the tax was paid were either of them void, for a reassessment under the provisions of sec. 1210*d*, 1210*e*, 1210*f*, and 1210*g* of the Statutes. The motions were denied by the court. The defendant offered no evidence, and the court, after making certain findings of fact relative to the assessment, held (1) that the defendant altered and changed the grade of the street in question without legal authority, and assessed the sum of $286.11 against the real estate of the plaintiff, for the work done in consequence of such change of grade, without legal authority so to do; and (2) that plaintiff is entitled to judgment against the city for said sum of $286.11 with interest, together with the costs of the action. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Daniel W. Hoan*, city attorney, and *Clifton Williams*, special assistant city attorney, and oral argument by *Mr. Williams*.

For the respondent the cause was submitted on the brief of *Frank B. Van Valkenburgh.*

VINJE, J. This action is brought under sec. 1164, Stats. (1898), to recover money paid to the city, under protest, for a special paving tax assessed on plaintiff's lot. It is claimed that the sum, or at least a portion thereof, so paid was really assessed and collected for an illegal change in the grade of the street and not for paving the same. The question arises, Does the statute apply to special improvement taxes? The word "tax" is generically broad enough to include special assessments, and whether or not it does so in a statute must be gathered from its context and the legislative intent, as ascertained from the general scheme of the act and the cognate acts of which it is designed to become a part. This statute appears under the subhead of "Miscellaneous provisions" in that part of ch. 49 relating to the assessment and collection of general taxes. It is followed by the subhead, "The assessment and collection of special taxes." It will be observed that the section provides that in case any town, city, or village shall have paid a judgment recovered in any such action, after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city, or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury. It also provides for a credit to the county treasurer by the state treasurer of the amount of state tax so collected and paid over to the state treasurer, and if any part of the unlawful tax shall have been paid to any school district before the payment of the judgment, such town shall charge the same to such district, and the town clerk shall add the same to the tax of such school district in the next annual tax. It seems apparent from these provisions that the word "tax" used in this statute relates only

to general taxes and not to special assessments, for careful provision is made enabling the town, city, or village to reimburse itself for any moneys it may have paid in case it shall be determined in the action that the plaintiff has been compelled to pay a greater tax than in justice and equity he should have paid. That the word "tax" as used in sec. 1164 relates to a general tax only and not to special assessments is made practically certain by sec. 1164*a*, which provides that if upon the trial of an action under the preceding section it shall appear that the assessment upon which the taxes were so paid is void, the court, before entering judgment, shall continue the action for a sufficient time to permit a reassessment. It further prescribes that the validity of the reassessment provided for may be attacked and determined and subsequent reassessments may be had as provided by sec. 1210*b*; provided, that such reassessment shall in all cases be made by the *assessor* of the assessment district wherein the property to be reassessed is situated. Sec. 1210*b* applies only to the reassessment of general taxes, and the fact that the assessor is to make the reassessment in case plaintiff prevails in the action shows conclusively that the statute applies to general taxes only, for, confessedly, the legislature could not have intended that the assessor of the assessment district should make a reassessment of special improvement taxes. Our statutes relating to the reassessment of special assessments provide that the proper authorities empowered to make the original assessment shall also make the reassessment. No case has come to our notice where it is the duty of the assessor to make special assessments.

Sec. 1164, as first enacted in ch. 88 of the Laws of 1870, did not include the words *city* and *village*. The act provided (sec. 1): "Any person aggrieved by the levy and collection of any unlawful tax assessed against him in any *town*, may have and maintain his action against such town for the recovery of all moneys so unlawfully levied and collected from

him." It is obvious that the word "tax" as here used could relate only to general taxes, for towns do not levy special assessments against property within their borders. The words "city" and "village" first appeared in ch. 334 of the Laws of 1878, but there is nothing in that chapter to indicate any intention to broaden or extend the meaning of the term "tax" as previously used. All actions heretofore brought under sec. 1164, so far as we have been able to ascertain, have related to general taxes. See *Keystone L. Co. v. Pederson,* 93 Wis. 466, 67 N. W. 696; *Day v. Pelican,* 94 Wis. 503, 69 N. W. 368; *Wells v. Western P. & S. Co.* 96 Wis. 116, 121, 70 N. W. 1071; *Bonnin v. Zuehlke,* 122 Wis. 128, 134, 99 N. W. 445. It is evident, therefore, from the section in question and from the cognate statutes of which it forms a part, that the word "tax" as used therein does not include or relate to special assessments, and that no action under the statute can be maintained to recover money paid for such assessments.

Under many special assessment statutes, as in the present case, the money is collected for the owner of the improvement certificate and is required to be paid over to him upon the presentation thereof to the treasurer of the municipality in which the special assessment tax is levied. It could not have been within the contemplation of the legislature that a taxpayer could maintain an action against a municipality after it had paid the amount of the tax collected to the person entitled to receive the same without any provision for reimbursing itself. In the present case the city treasurer had collected and paid over the money to the holder of the certificate before the action was commenced. Since the city treasurer had paid over to the person entitled thereto the whole of the tax collected, no common-law action for money had and received can be maintained against the city. Such action is founded upon the theory that the defendant has the money which is sought to be recovered, or that he has been enriched by the transaction, so that in equity and good conscience he should

be compelled to turn over to plaintiff a portion or the whole of the amount in controversy. The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same. 27 Cyc. 869; *Limited Inv. Asso. v. Glendale Inv. Asso.* 99 Wis. 54, 74 N. W. 633; *Johnston v. Charles Abresch Co.* 109 Wis. 182, 85 N. W. 348; *Glendale Inv. Asso. v. Harvey L. Co.* 114 Wis. 408, 90 N. W. 456; *Douglas Co. v. Sommer,* 120 Wis. 424, 98 N. W. 249; *J. V. LeClair Co. v. Rogers-Ruger Co.* 124 Wis. 44, 102 N. W. 346. It follows, therefore, that neither an action under the statute nor a common-law action for money had and received lies against the city, and that the court should have granted the motion for a nonsuit.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint on the merits.

BREY, Respondent, vs. FORRESTAL and another, Appellants: SELLERS, Administratrix, Respondent, vs. FORRESTAL and another, Appellants.

November 1—November 19, 1912.

Master and servant: Injury from boiler explosion: Pleading: Variance: Special verdict: Instructions to jury: Submission of ground of negligence not pleaded: Waiver of objection to evidence: Cross-examination: Appeal: Errors, when cured: Prejudicial errors.

1. In an action for injuries sustained by an employee through the explosion of a steam boiler, no defect in the design or construction of the boiler was alleged, but in connection with this question of the special verdict, "Was the boiler in question negligently kept by defendants in a dangerous and unsafe condition?" the court charged the jury in effect that they should an-

swer in the affirmative if satisfied from the evidence that the boiler was so kept either by reason of the construction and maintenance of the fire flue therein or by reason of a globe valve thereon being closed. *Held* error, because under such charge the jury might have found defendant negligent solely upon the ground of improper construction of the fire flue—a matter not within the issues.

2. Such error was not cured by the jury's finding, as a separate ground of negligence, failure to warn plaintiff of the likelihood of the boiler exploding by reason of its dangerous condition, since such finding relates back to and is inseparably connected with the question of defective construction of the fire flue. TIMLIN, J., dissents.

3. Where a complaint for injuries resulting from the explosion of a steam boiler charges certain specific defects in the boiler, but not defective construction of the fire flue, the admission of evidence, against objection and without amendment of the complaint, of such defect in the fire flue and submission of the same to the jury was error, unless the objection was afterwards withdrawn or waived.

4. Where plaintiff, after a ruling by the court excluding evidence of such unpleaded defect, introduced expert testimony as to the construction of the fire flue and its collapse inward, expressly for the purpose of showing why the witness reached the conclusion that the explosion was due to excessive steam pressure, defendants had the right to rest upon the assurance that such testimony was offered and received for the sole purpose stated, and to cross-examine fully thereon without opening the door to testimony upon the general subject of the safe construction of such flue.

5. Erroneous admission of evidence of an unpleaded defect against defendants' objection, and submission of the same to the jury, must be deemed to have affected a substantial right of defendants, namely, the right to know what charge of negligence is made against them in time to prepare their defense, and is therefore ground for reversal.

APPEALS from judgments of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

These are two actions in tort which were tried together before the same jury and on the same evidence. The defendants owned and operated, by means of employees, a dredging outfit for the digging of drainage ditches through swamp

lands. The outfit consisted of a scow, seventy-five feet long and eighteen feet wide, on the rear end of which was placed a boiler and near the front end an engine, together with drums controlled by levers which operated the dipper. The ditch was made by the dipper at the front as the scow proceeded forward, the same being floated in the ditch thus made; and the work continued night and day. The work required two shifts of three men each: an engineer or "runner," so called because he ran the drums and the dipper by the pulling of levers; a fireman; and a roustabout. On one shift one Kane was the engineer, and on the other shift Sellers (the plaintiff *Emma Sellers's* intestate) was engineer and the plaintiff *Brey* was fireman.

On the morning of May 29, 1909, at about 5 o'clock, while Sellers's shift was operating the dredge near Dancy, Wisconsin, the boiler exploded without warning, killing Sellers and seriously injuring *Brey,* and these actions are the result of that explosion.

The charges of negligence in the complaint in the *Brey Case* are as follows:

"Second. That on said day and for some time prior thereto, plaintiff alleges on information and belief the defendants had carelessly, recklessly and negligently, suffered, permitted and caused the said boiler, the steam gauge and safety valves attached thereto to become and be out of repair, worn, weakened, dangerous and unfit for use; that said defendants carelessly and negligently permitted and caused water taken from said ditch, which water was filled with sediment and dirt, to be taken into and used in said boiler, thereby causing parts of said boiler to burn, bake and foam and otherwise rendering its use and that of the steam gauge unreliable and dangerous; that on said day and prior thereto, said defendants had and did carelessly and negligently suffer, permit and cause the safety valve upon said boiler, a device used to automatically permit of the discharge of steam, thereby relieving the strain or pressure upon the boiler before the same became dangerous,

to become and be defective, plugged up, out of repair and useless, thereby and by reason of the weakened and defective condition of said boiler and the causes aforesaid, defendants carelessly and negligently caused, suffered and permitted the place upon said scow or dredge boat and in the vicinity of said steam engine and boiler to become and be unsafe and extremely hazardous and dangerous to this plaintiff and other servants of the defendants there employed; that owing to the said defective, weakened and dangerous condition of said boiler and the failure of said safety valve and steam gauge to properly work, owing to their plugged and defective condition as aforesaid, the said boiler on said day, when subjected to strain and pressure in an attempt to generate the steam necessary to operate said dredge, exploded with great force and violence, thereby killing one person and injuring others of the defendant's servants there employed, and among them this plaintiff was then and there seriously and permanently injured as hereinafter more fully appears."

"That plaintiff, to the knowledge of defendants, was wholly inexperienced in and about the proper care, control and operation of steam engines and boilers and was wholly unaware of the danger and likelihood of said boiler exploding because of its said defective condition and uses, and the defective condition of said steam gauge and safety valve, and was wholly unaware of the said engineer's incompetency, lack of experience, knowledge and capacity necessary to safely and properly discharge the said duties of an engineer; that though plaintiff was thus ignorant and uninformed and wholly ignorant of the danger to which plaintiff's service for defendants subjected plaintiff, defendants negligently and carelessly set plaintiff to work in said dangerous place and at said dangerous work upon said scow or dredge boat, and near to said steam engine and boiler, without giving plaintiff any warning, caution or information concerning same, or of the great risk and peril to which plaintiff was thereby subjected; that while thus employed and while ignorant of said danger and peril and of said dangerous conditions, on said day, and without fault or negligence on his part, but solely through the fault and negligence of said defendants, the said boiler exploded

with great force and violence, thereby seriously and permanently injuring plaintiff more specifically as hereinafter stated."

In the *Sellers Case* the charges of negligence were substantially the same as in the *Brey Case,* except that it was not alleged that Sellers was inexperienced in the operation of steam engines and boilers.

In the *Brey Case* the following special verdict was returned:

"(1) Was the boiler in question negligently kept by defendants in a dangerous and unsafe condition at and prior to the time of the accident? *A.* Yes.

"(2) If you answer No. 1 'Yes,' then answer: Did the defendants know of such dangerous and unsafe condition prior to the accident? *A.* Yes.

"(3) If you answer No. 1 'Yes' and No. 2 'No,' then answer this question: Ought the defendants in the exercise of ordinary care to have known of such condition? *A.* ——.

"(4) If you answer question No. 1 'Yes,' then was such dangerous and unsafe condition of the boiler a proximate cause of plaintiff's injuries? *A.* Yes.

"(5) Was the use of the closed globe valve a proximate cause of the boiler explosion? *A.* Yes.

"(6) If you answer question No. 1 'Yes,' then did defendants instruct or warn the plaintiff of such condition? *A.* No.

"(7) If you answer No. 1 'Yes' and No. 6 'No,' then answer this: Ought plaintiff in the exercise of ordinary care to have known of such dangerous and unsafe condition? *A.* No.

"(8) If you answer No. 6 'No,' then answer this: Were the defendants guilty of a want of ordinary care in failing to inform the plaintiff prior to his injuries of the likelihood of the boiler exploding? *A.* Yes.

"(9) Ought the plaintiff in the exercise of ordinary care to have appreciated the likelihood of the boiler exploding? *A.* No.

"(10) If you answer question No. 6 'No,' then answer this: Was such failure to inform the plaintiff of the likeli-

hood of the boiler exploding a proximate cause of plaintiff's injuries? *A.* Yes.

"(11) Was plaintiff guilty of a want of ordinary care which proximately contributed to his injuries? *A.* No.

"(12) At what sum do you assess plaintiff's damages? *A.* $7,000."

In the *Sellers Case* the following special verdict was returned:

"(1) Was the boiler in question unsafe and dangerous at and prior to the accident, owing to any improper design or construction of the fire flue? *A.* Yes.

"(2) If you answer question 1 'Yes,' then answer: Did the defendants know prior to the accident of such unsafe and dangerous design and construction of the fire flue? *A.* No.

"(3) If you answer No. 1 'Yes' and No. 2 'No,' then answer: Ought the defendants in the exercise of ordinary care to have known of such unsafe and dangerous design and construction of the fire flue? *A.* Yes.

"(4) Was the boiler unsafe and dangerous prior to the accident owing to the use of the closed globe valve under the pop valve? *A.* Yes.

"(5) If you answer No. 4 'Yes,' then did defendants know prior to the accident of such unsafe and dangerous use of the closed globe valve? *A.* Yes.

"(6) If you answer 4 'Yes' and 5 'No,' then answer: Ought the defendants in the exercise of ordinary care to have known of such unsafe and dangerous use of said closed globe valve? *A.* ——.

"(7) If you answer question 1 and 4 or either of them 'Yes,' then answer this: Were the defendants guilty of negligence in the use of such unsafe and dangerous boiler? *A.* Yes.

"(8) If you should answer the seventh question 'Yes,' then was such negligence the proximate cause of the injury and death of Sellers? *A.* Yes.

"(9) If you answer either or both 1 and 4 'Yes,' then answer: Ought the deceased, Joseph Sellers, in the exercise of ordinary care to have known of such danger? *A.* No.

"(10) Was the deceased, Joseph Sellers, guilty of a want

of ordinary care which proximately contributed to his injuries? *A.* No.

"(11) At what sum do you assess plaintiff's damages? *A.* $2,500."

Judgment for the plaintiff was rendered in each case, and the defendants appeal.

For the appellants there was a brief by *John J. Maher,* attorney, and *Thomas H. Gill,* of counsel, and oral argument by *Mr. Gill.*

D. D. Conway, attorney, and *P. H. Martin,* of counsel, for the respondents, contended, *inter alia,* that defendants, not having objected to the issues submitted nor assigned error thereon, could not now raise the objection. *Howard v. Beldenville L. Co.* 134 Wis. 644, 114 N. W. 1114; *Sloteman v. Thomas & W. Mfg. Co.* 69 Wis. 499, 34 N. W. 225; *Duffy v. Radke,* 138 Wis. 38, 41, 119 N. W. 811.

WINSLOW, C. J. The most serious and important claim made by the appellants in these cases is that, without amendment of the complaints and against the defendants' specific objection, the plaintiffs were allowed to prove and the jury to find that the boiler was defective in the design and construction of its fire flue, whereas the defects charged in the complaints were defects and weaknesses resulting from wear and tear, improper use, and improper plugging of the safety valve.

It is very certain that this issue was litigated and passed upon by the jury in the *Sellers Case.* The first question of the special verdict in that case submits this precise issue, and the jury answered it in the plaintiff's favor; also by their answers to questions 7 and 8 in that case they found the use of the boiler with such defective design and construction to be negligence which was the proximate cause of Sellers's death.

In the *Brey Case* there is no direct question submitted to the jury as to defective design or construction, but it seems

For the respondent the cause was submitted on the brief of *Frank B. Van Valkenburgh.*

VINJE, J. This action is brought under sec. 1164, Stats. (1898), to recover money paid to the city, under protest, for a special paving tax assessed on plaintiff's lot. It is claimed that the sum, or at least a portion thereof, so paid was really assessed and collected for an illegal change in the grade of the street and not for paving the same. The question arises, Does the statute apply to special improvement taxes? The word "tax" is generically broad enough to include special assessments, and whether or not it does so in a statute must be gathered from its context and the legislative intent, as ascertained from the general scheme of the act and the cognate acts of which it is designed to become a part. This statute appears under the subhead of "Miscellaneous provisions" in that part of ch. 49 relating to the assessment and collection of general taxes. It is followed by the subhead, "The assessment and collection of special taxes." It will be observed that the section provides that in case any town, city, or village shall have paid a judgment recovered in any such action, after having paid over to the county treasurer the state and county tax levied and collected as part of such unlawful tax, such town, city, or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state and county tax so paid into the county treasury. It also provides for a credit to the county treasurer by the state treasurer of the amount of state tax so collected and paid over to the state treasurer, and if any part of the unlawful tax shall have been paid to any school district before the payment of the judgment, such town shall charge the same to such district, and the town clerk shall add the same to the tax of such school district in the next annual tax. It seems apparent from these provisions that the word "tax" used in this statute relates only

to general taxes and not to special assessments, for careful provision is made enabling the town, city, or village to reimburse itself for any moneys it may have paid in case it shall be determined in the action that the plaintiff has been compelled to pay a greater tax than in justice and equity he should have paid. That the word "tax" as used in sec. 1164 relates to a general tax only and not to special assessments is made practically certain by sec. 1164*a*, which provides that if upon the trial of an action under the preceding section it shall appear that the assessment upon which the taxes were so paid is void, the court, before entering judgment, shall continue the action for a sufficient time to permit a reassessment. It further prescribes that the validity of the reassessment provided for may be attacked and determined and subsequent reassessments may be had as provided by sec. 1210*b*; provided, that such reassessment shall in all cases be made by the *assessor* of the assessment district wherein the property to be reassessed is situated. Sec. 1210*b* applies only to the reassessment of general taxes, and the fact that the assessor is to make the reassessment in case plaintiff prevails in the action shows conclusively that the statute applies to general taxes only, for, confessedly, the legislature could not have intended that the assessor of the assessment district should make a reassessment of special improvement taxes. Our statutes relating to the reassessment of special assessments provide that the proper authorities empowered to make the original assessment shall also make the reassessment. No case has come to our notice where it is the duty of the assessor to make special assessments.

Sec. 1164, as first enacted in ch. 88 of the Laws of 1870, did not include the words *city* and *village*. The act provided (sec. 1): "Any person aggrieved by the levy and collection of any unlawful tax assessed against him in any *town*, may have and maintain his action against such town for the recovery of all moneys so unlawfully levied and collected from

In order to understand the basis of this claim it will be necessary to state some additional facts as well as some details of the trial.

The dredging outfit was purchased by the defendants from a steam shovel company in the early part of the year 1907 and had been in use two seasons and up to May 29, 1909. The boiler was horizontal, round, about ten feet in length and fifty-four inches in diameter, having a round fire flue, which served as the furnace, twenty-nine inches in diameter, extending from the front of the boiler about eight feet to the rear, and terminating in a combustion chamber which was separated from the rear end sheet of the boiler by a space of four or five inches, the combustion chamber being considerably larger than the fire flue. Fifty-four fire tubes or flues, two and one-half inches in diameter, extended from the combustion chamber above and at the side of the fire flue or furnace forward to the front of the boiler, thus bringing the smoke back to the smokestack. The fire flue and combustion chamber were completely surrounded by water when the boiler was properly operated. About midway in the length of the boiler was the steam dome, and out of it projected a two and one-half inch steam pipe carrying steam to the engine, also a one and one-half inch safety valve pipe extending through the roof, and intended to be furnished with the ordinary pop valve for safety purposes. There was a water glass and a steam gauge, and the pressure ordinarily carried was from 100 to 115 pounds. If the pressure went below ninety-five pounds the dredge would not operate as well as it should. For some reason—probably owing to the vibration of the scow—the pop valve or safety valve on the end of the last-named pipe was apt to become loose, and three or four such valves had been blown off by the pressure and became lost in the marsh, allowing all the steam to escape from the boiler and necessitating in each case a shut-down of several hours in order to get up steam pressure again. There is testimony

that Sellers inserted a plug in the pipe after one of the pop valves blew off, thus closing it entirely. The last pop valve put on was arranged to go off at ninety-five pounds pressure, and at or before the time it was put on a globe valve was put on just below it, with the apparent idea that if the pop valve blew off the globe valve could be at once turned and thus prevent the boiler from being emptied of steam. It seems that Sellers or Kane put on the globe valve, but there is a dispute as to which did it. There is no doubt, however, that both knew of it. Either of them had authority to purchase such incidental repairs as were necessary and place them in position. For some days before the explosion the globe valve had been closed, and it was found closed after the explosion. *Brey* testified that he did not know the globe valve was there or that it was closed. He also testified that on the morning of the explosion he had raised the steam pressure to about ninety-five pounds, that he had a good fire on, and he proceeded to oil the machinery for about five or ten minutes, when the explosion took place. No one knows the pressure at the time of the explosion. The boiler was shot out of the scow by the force of the explosion and landed in the marsh some 500 feet distant.

The plaintiffs claimed that the explosion was caused by pressure of steam which the boiler in its weakened condition, with a closed escape valve, could not stand, while the defendants' theory was that the explosion resulted because the water was allowed to become too low in the boiler by the fireman, *Brey*. The plaintiffs placed upon the witness stand two witnesses, Mr. Henry J. Mistle and Prof. Mortimer Cooley, to give expert testimony as to the cause of the explosion after examination of the boiler. Both witnesses, after qualifying themselves to testify as expert engineers, testified that in their judgment the explosion was caused by excess of steam pressure, and that there was no evidence that it was caused by low water. Both witnesses based their conclusion principally

upon the fact that the fire flue collapsed inward, indicating that the flue was compressed by the pressure of steam in the boiler around it. In the course of Mr. Mistle's direct examination he was asked: "You may state what the fact is with reference to the strength of this type of fire flue as compared with the ones now in general use," and replied: "They are not fit for the high pressure they are carrying." At this point the defendants' counsel objected to the question on the ground that there was no issue in the pleadings as to the original construction of the boiler. Upon this objection argument was heard, and in course of the argument defendants' counsel moved to strike out the answer which had been made. The court ruled with the defendants, and thereupon the plaintiffs moved for leave to amend the complaints so as to charge that the boiler was defective in type. On this motion being made, the defendants claimed that they were not ready to meet such an issue, and that the cases would have to go over the term if the amendment were made. This statement was apparently received by court and counsel as sufficient without affidavit, and thereupon plaintiffs' counsel concluded that there was sufficient in the pleadings as they stood and he would not press the motion to amend. Mr. Mistle had stated without objection, just before the question above referred to was put, that the boiler was of an obsolete type, and the defendants' attorney now moved to strike out all testimony as to the original condition or the type of the boiler, which motion was granted. These rulings we regard as strictly correct, and if the matter had stopped here the question before us never would have arisen. On Mr. Cooley's examination, however, the situation changed somewhat. He stated his conclusion that the cause of the explosion was excess of pressure and not low water, and was then asked to point out to the jury what there was about the boiler which tended to support his conclusion, he being allowed to use some rough sketches which he had made to make the answers more clear. On objection be-

ing made to this form of examination because of the ease with which incompetent testimony might come in without opportunity for making objection, plaintiffs' counsel said that the idea was to point out why the witness concluded that the explosion was due to high pressure and not to low water, and the court overruled the objection, saying that the witness was subject to interruption at any time if improper testimony appeared. The witness then proceeded without questions to explain the construction of the boiler at length, the character of the joints, the nature of the fractures made by the explosion, and generally all facts which he observed about the boiler and which he thought tended to support the conclusion that pressure of steam on the fire flue caused the explosion. In the course of his testimony the witness was asked whether there were any rings or other devices to reinforce the fire flue and replied in the negative, and further said that the flue was made of a single sheet. He had previously testified that the fire flue was constructed with lap joints, which have but seven tenths of the strength of butt joints, and all of these facts were apparently considered by the witness as facts tending to support his expert opinion that the explosion was the result of pressure of steam. Probably this testimony was admissible for the purpose for which it was offered, but because admissible for that purpose it cannot necessarily be considered as admissible for the purpose of proving an independent ground of liability not set forth in the pleadings, especially after the court had definitely ruled on that subject and the offer of the testimony was accompanied by the express statement that it was intended for the purpose of showing why the witness reached the conclusion that the explosion was due to steam pressure. We think that defendants' counsel was entitled to rest upon the assurance that the testimony was offered and received for the one purpose stated, and not for the purpose of injecting into the case a new ground of liability to which he had so recently successfully objected. The testi-

mony being properly received, the defendants certainly had full right to cross-examine on all matters gone into by the plaintiffs without forfeiting their right to have the action confined to the cause of action pleaded. It was expert testimony and its weight depended upon the qualifications of the expert, and it is well settled that an expert may be subjected to fairly exhaustive cross-examination upon subjects which legitimately throw light on his qualifications, such as his education, the extent of his experience in practical application of his art or science, the extent of his observation outside of his own work, as well as other cognate matters bearing directly on his ability as an expert.

It was doubtless in reliance upon this principle that the defendants' attorney upon cross-examination asked the witness questions concerning the supposed weakness in the construction of the fire flue, and particularly whether it was of unusual length, whether he ever saw a single-sheet fire flue of that length before, whether he considered it weak in construction, and if so how he would have constructed it in order to make it of greater strength.

All this seems to us to have been clearly legitimate cross-examination and not to have been examination upon a new subject, thus opening the door to an inquiry as to a new ground of liability not covered by the pleadings. Nevertheless, when plaintiffs' counsel took the witness upon redirect examination, counsel for the plaintiff proceeded to ask the witness whether such fire flues were in general use and how long since they had been in general use, for the purpose of showing that the type had been obsolete for thirty years. Upon objection to this testimony the court ruled that by his cross-examination the defendants' counsel had opened the door to testimony upon the general subject of the safe construction of such flues, and the witness was allowed to answer the questions and did answer them in effect as desired by the plaintiffs.

Thus the question of defective original construction of the fire flue was allowed to be brought into the case, and thereafter, as we have seen, the question was submitted to the jury, and the finding of the existence of such defect forms an inherent part of the ground of recovery in both actions which cannot be separated from the other grounds of liability found.

This court has gone as far as any court, we believe, in disregarding mere defects of form in pleadings and in endeavoring to administer justice even when technical requirements of pleading have not been followed, providing no substantial prejudice has resulted therefrom to the complaining party. *McHolm v. Philadelphia & R. C. & I. Co.* 147 Wis. 381, 132 N. W. 585. This is especially true where evidence has come in without objection. *Hemenway v. Beecher,* 139 Wis. 399, 121 N. W. 150; *Swanby v. Northern State Bank,* 150 Wis. 572, 137 N. W. 763. In the present case, however, there was timely and persistent objection to the introduction of any evidence concerning defects in original construction of the fire flue, as we have already seen. That objection was not waived by the cross-examination of the witness Cooley, and there is no room for holding that this question was ever tried by consent. It is very evident that the question of defects in original construction is a very important one. The defendants could not be expected to meet that question in a day or perhaps in weeks. Counsel would not be justified in going to trial on that issue without considerable investigation, necessitating certainly the testimony of experts and perhaps the taking of depositions in other states.

It seems apparent to us that the fundamental error which was committed by the court in allowing this new ground of liability to be litigated and submitted to the jury without amendment of the pleadings and without consent, either express or implied, must reverse the case. It must be considered to have affected the defendants' substantial rights, namely, the right to know what charge of negligence is made

against him in time to make due preparations to meet it. Although the testimony was taken and the objections and exceptions reserved in the *Brey Case* alone, we regard the stipulation by which that testimony was to be considered in the *Sellers Case* with the same force and effect as if repeated in the latter case, as preserving the objections and exceptions in the *Sellers Case.* Some other questions are raised, but as there must doubtless be amendment of the complaint and perhaps a considerable change in the issues presented, we do not feel obliged to discuss them now. For the reasons stated, there must be new trials in both cases.

By the Court.—Judgment reversed in each case, and action remanded for a new trial.

In the case of *Brey v. Forrestal and another* the following opinion was filed:

TIMLIN, J. (*dissenting*). I think the judgment in this case should have been affirmed. The case as decided seems to support a conclusion that if the boiler was defective from two causes, one of which was charged in the pleadings and the other not, and evidence properly admitted to establish the former defect but evidence erroneously admitted to establish the latter defect, a judgment based on a verdict finding defendants negligent in failing to warn plaintiff of any danger should be reversed. I do not think this is correct or in conformity with precedent. It is a very old rule, often acted upon by this court, that surplusage in a verdict, pleading, or other record does not annul or avoid that which is, aside from the surplusage, sufficient. This rule was applied even in the most technical stage of the common law, and it should not be departed from now when none but prejudicial errors are cause for reversals.

BUDNY, by guardian *ad litem*, Appellant, vs. AMERICAN CANDY COMPANY, Respondent.

November 1—November 19, 1912.

Master and servant: Injury to boy from machinery: Knowledge of danger: Instruction and warning: Negligence.

In an action for injury to a boy under fifteen years of age, employed in defendant's candy factory, whose hand was caught between the rolls of a candy machine, the evidence is *held* to show, contrary to findings by the jury, that the boy was fully informed of the danger and that there was no negligence on the part of the defendant in failing to instruct and warn him.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The plaintiff suffered the loss of three fingers and the partial loss of a fourth finger on his left hand on a cough drop machine while he was working for the defendant, and brings this action by his guardian *ad litem* to recover damages for the injuries.

The cough drop machine consists principally of two brass rollers between seven and eight inches long and four inches in diameter. There are oblong indentations on the surfaces of both rollers, which meet as the rollers revolve close to one another and shape the candy as it runs between the rollers into drops. The rollers are a small fraction of an inch apart, and the drops as they come from the machine are connected by a thin sheet of candy which is formed between the rollers. The rollers are held in a frame, and the gearing causing the revolution of the rollers is driven by a pulley and belt, which in the present instance were electrically propelled and caused the rollers to revolve sixty to eighty times a minute. The machine was placed near the edge and about the middle of a wide table about sixteen feet long. The hot candy is fed from the heating table up an incline and between the rollers on the

side of the machine on which the rollers converge as they revolve. An air pipe ran up from the edge of the table alongside of the rollers and from this an arm or small spout extended out over the top roller. The air from this spout, which opened about three inches above the top roller, was blown onto the roller to cool it and the candy as it came from the machine, thus preventing a sticking of the candy to the roller.

On the day before the accident the plaintiff went to work for the defendant and was put at work with another new boy by the foreman of the defendant. Plaintiff's duty was to receive the candy as it came from the machine and with a stick break the sheet of candy so that the drops would be separated, and then to push the candy along the table to be handled by other employees. The roller could not be kept sufficiently cool and the candy would stick to the rollers. At times grease or starch would be placed on the rollers to prevent the candy sticking to them. At other times the feeding of the hot candy would be stopped and a board about four inches wide would be placed on the incline, over which the candy was fed into the machine and held in position by a monkey wrench, and the air spout would be so turned that the air current would strike the board and be forced between the rollers to cool them. This might happen eight or ten times a day.

The plaintiff testified that about 10:30 o'clock on the morning of September 13, 1910, the second day he was working for the defendant, the supply of candy was exhausted and he sat down near the machine, and that George Diedrich, the workman who fed the candy into the machine, while passing by, told him to turn the air on the machine; that he went to the side of the machine at which he had been working and with his left hand took hold of the spout to move it as he had been directed; that the spout moved more easily than he expected; and that his hand slipped over the top of the roller and his fingers were caught between the rollers and crushed

and injured. He also stated that neither the defendant's foreman nor George Diedrich, his superior, had given him any warning or instruction as to the danger of getting his hand between the moving rollers.

George Diedrich, the candy maker, testified that he had not directed the plaintiff to turn on the air. He also testified that on the previous day he had caught the plaintiff in the morning fooling with the machine and that he gave him instructions that he was not to touch the machine; and that he found the air turned off by a damper in the blow pipe, and that he then told the plaintiff that he wanted the air on and he himself opened it again. He testified that in the afternoon he caught the plaintiff running his hands on the rollers, and that just previous to the time of the accident he had adjusted the board and monkey wrench and the air spout so as to cool both rollers.

The foreman for the defendant, who had charge of the stock candy room and who had put the plaintiff at work when he started on the day before the accident, testified that he told both of the boys who came to work at that time that they should work for Mr. Diedrich and do what he told them, and that he showed them at the start what they were to do. He also testified that at the time of the accident he heard a call, that he went to the plaintiff, who had just been released from the machine, took him to a sink about twenty or twenty-five feet away, and that the plaintiff, in reply to a question of how the accident happened, said in a crying way that he was playing with the wind.

The boy who went to work for the defendant at the same time as the plaintiff stated that when they first went to work George Diedrich told him and the plaintiff to stay away from the machine and not to touch it, and that about an hour afterwards he heard Diedrich tell the plaintiff not to monkey with the machine.

Walter Comdohr, the person who stopped the machine and

released the plaintiff, testified that he found the board and monkey wrench on the machine, at the time of the accident, adjusted as Diedrich testified he had left them. One of the girls who was working at the table with the plaintiff testified that the foreman had told the plaintiff to be careful about the rollers.

The plaintiff, called as an adverse witness, testified as follows:

"*Q*. You have seen a clothes wringer, haven't you? *A*. Yes, sir. *Q*. And you know how they work? *A*. Yes, sir. *Q*. You knew, didn't you, that if you got your finger in between these rolls on the side where the candy was fed in that they would get drawn in there? *A*. Yes, sir. *Q*. You could see that? *A*. I couldn't see it, but I knew it. *Q*. You knew that was what would happen? *A*. Yes, sir. *Q*. You knew from looking at the side of the machine at which you worked that the opening on the other side was exactly opposite, it was exactly opposite the place where the rolls separate. That is, the side where anything was fed in was exactly opposite the side where anything was fed out. You knew that, didn't you? *A*. Yes, sir."

The jury returned a special verdict finding that the danger of getting his fingers caught in the rollers was not so obvious that the plaintiff, considering his age, intelligence, and experience, should have known and appreciated it; that the defendant failed to give the plaintiff such warning or instruction before the injury as would enable a person of his age and experience, exercising due care, to appreciate such danger; that such failure was the proximate cause of the injury; that the plaintiff was directed by George Diedrich to shift the air blower just before the accident; and that no lack of ordinary care on the part of the plaintiff proximately contributed to his injuries.

The court granted defendant's motion to change the answer to one of the questions of the special verdict, by which the jury found that the plaintiff was directed by George Died-

rich to shift the air blower just before the accident, and found this issue in the negative, and also granted defendant's motion to dismiss the complaint. This is an appeal from the judgment so ordered.

For the appellant there was a brief by *W. B. Rubin*, attorney, and *Wallace Ingalls* and *A. W. Foster*, of counsel, and oral argument by *Mr. Ingalls*.

For the respondent there was a brief by *Lawrence A. Olwell*, attorney and of counsel, and *Burr J. Scott*, of counsel, and oral argument by *Mr. Olwell*.

SIEBECKER, J. The jury found that the plaintiff, a boy fourteen years and seven months of age at the time of the accident, in the light of his age, intelligence, and experience did not know or appreciate, and ought not to have known and appreciated, the danger of getting his fingers caught in the rollers, and that defendant was negligent in not warning and instructing him of this danger so as to enable him to have understood and appreciated it. The duty of warning a servant of dangers does not apply to a servant who is familiar with the work and the tools and appliances, and does not apply when the dangers are well known to the servant and when they are such as he is fully capable of appreciating. This rule is elementary and has received numerous applications in the decisions of this court, of which the following may be cited: *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362; *Wagner v. Plano Mfg. Co.* 110 Wis. 48, 85 N. W. 643.

In the foregoing statement, the evidentiary facts as to plaintiff's knowledge of the alleged danger and also defendant's want of care are presented. There can be but one rational inference drawn therefrom as respects these two questions, which is that the plaintiff was fully informed of the alleged danger of his employment, and hence that warning

and instruction to inform him thereof so that he might appreciate the attendant hazard were not required to be given to him. A study of the facts convinces us that the evidence fails to show that the defendant was guilty of any want of care which proximately caused plaintiff's injury, and that the jury's finding that defendant negligently omitted to give plaintiff needed instruction and warning is not supported by the evidence. The evidence is within so narrow a compass and so directly to the point that discussion of it as to its probative effect and force can afford no assistance in drawing the legitimate inferences therefrom. We are constrained to hold that the evidence fails to show a cause of action against the defendant upon the grounds alleged, and the judgment dismissing the complaint must stand.

By the Court.—Judgment affirmed.

SCHENCK and another, Respondents, vs. STERLING ENGINEERING AND CONSTRUCTION COMPANY, Appellant.

November 2—November 19, 1912.

Actions: Consolidation: Bringing in parties: Pleading: Cross-complaint: Real-estate brokers: Several claims for commission on same sale: "Controversy:" "Transaction."

1. Separate actions at law, brought by two real-estate brokers each of whom claims, under a separate and distinct contract, a commission for securing the purchaser to whom defendant sold land, cannot be consolidated under sec. 2792, Stats. (1898), because they could not have been joined originally.
2. Where in each of said actions defendant denies any liability, the plaintiff in one of them cannot be brought in as a party to the other, under sec. 2610, Stats. (1898), because a complete determination of the controversy in such other action can be had without his presence and without prejudice to his rights.
3. Where in such a case defendant sought to have the plaintiff in one action brought in as a party to the other, asking in the

answer that said plaintiff be enjoined from prosecuting his several action and be compelled to litigate his claim in the action to which he should so be made a party and that one final judgment determine the rights of all parties, sec. 2656a, Stats. (1898), is inapplicable, because the defendant is not entitled to any affirmative relief against said plaintiff, and because the relief asked does not affect either the "contract" or the "transaction" which is the subject matter of the action, and the action is not brought in reference to "property."

WINSLOW, C. J., and SIEBECKER, J., dissent.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The complaint sets forth two causes of action, one on express contract and one on *quantum meruit.* In the cause of action on express contract the plaintiffs allege an agreement on the part of the defendant to pay them as commission for procuring a purchaser for certain described premises all said property sold for over and above $54,000. Plaintiffs allege that they did procure purchasers in the persons of Morris Miller and Max Routt, who bought the property for $58,800, and that under the agreement there is due them as commission the sum of $4,800.

In the second cause of action it is alleged that the plaintiffs were employed by the defendant as brokers to procure a purchaser for the property described; that the plaintiffs did procure purchasers in the persons of Miller and Routt and rendered other services in connection with the sale, and that the services so rendered were reasonably worth $2,270, according to the rule of the real estate board of the city of Milwaukee. Judgment is demanded for $4,800 or such other sum as may be found due plaintiffs.

To this complaint the defendant interposed an answer consisting in part of a general denial of the allegations of the complaint. The defendant denied having employed the plaintiffs and denied that the plaintiffs rendered it any services or procured any purchaser for its property. The answer then sets up that one *Franklin H. Feasley* had commenced an

action in the circuit court for Milwaukee county against the defendant, in which he sought to recover from it the sum of $2,175 for procuring the purchasers for the real estate hereinbefore referred to, and that said *Feasley* alleged in his complaint that he had in fact secured said Miller and Routt to buy the property in question from the defendant. It appears clearly enough from the pleadings that the plaintiffs in this action, *Schenck* and *Hayward,* claimed to have secured Miller and Routt as purchasers for the defendant's property, and that *Franklin H. Feasley,* the plaintiff in the other action, claimed that he procured Miller and Routt as purchasers for the same property, and that there is a dispute between the rival real-estate agents as to which is entitled to the commission on the sale, if either of them is entitled thereto. The defendant also denied liability in the action which *Feasley* brought. The answer prayed that *Feasley* be enjoined from prosecuting his action until the case brought by *Schenck* and *Hayward* was determined; that *Feasley* be made either a party plaintiff or a party defendant in said action and be compelled to litigate therein the issues between himself and the defendant, and that a single final judgment determine the rights of all three of the parties in the premises. The defendant proceeded by order to show cause, and on a hearing of such order the court held that the relief asked could not be granted for the reason that the statutes did not authorize the court to bring in *Feasley* as a party defendant in the action we are considering, and neither did the common law of the state authorize any such proceeding. From an order denying the defendant's application this appeal is taken.

G. J. Davelaar, for the appellant.

For the respondents *Schenck* and *Hayward* the cause was submitted on the brief of *H. L. Kellogg,* and for the respondent *Feasley* on that of *Perry, Morton & Kroesing.*

BARNES, J. The appellant is in a somewhat embarrassing situation. Two parties are claiming full compensation from

it for performing the same service. Each claims to have secured the purchasers, and neither admits that the other is entitled to any part of the compensation alleged to be due for the services rendered. Separate trials of the two actions may result in two judgments which will obligate the defendant to pay twice for the same service. To relieve itself from this dilemma, the defendant sought to enjoin the prosecution of one of the actions and to bring all of the parties before the court in the other, so that the plaintiffs in both actions would be bound by the judgment in the one first rendered.

Both cases are straight actions at law on contract. We must look to the Code to see whether or not the remedy here pursued is permissible. Obviously a situation is presented where it might be proper enough to consolidate the two actions. It is just as obvious that the general consolidation statute (sec. 2792, Stats. 1898) does not help the defendant, because it provides for the consolidation of only such actions as might originally have been properly joined. These two actions could not have been joined. *Winninghoff v. Wittig*, 64 Wis. 180, 183, 24 N. W. 912; *Peck v. School Dist.* 21 Wis. 516.

Had the defendant admitted liability to someone for the amount claimed, its remedy would be simple enough, because sec. 2610, Stats. (1898), provides for an interpleader in such a case.

Secs. 2610 and 2656*a*, Stats. (1898), are relied on in support of the practice here pursued. Secs. 2420, 2600, 2656, and 2657 are also cited, but we see no room for the contention that any of the four sections last referred to authorize the practice which the defendant attempted to pursue. The first question presented by the appeal is: Does sec. 2610 authorize the bringing in of *Feasley* as a party to this action? The following is the only portion of sec. 2610 which has any application to the situation:

"The court may determine any controversy between the parties before it, when it can be done without prejudice to

the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, or any persons not parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court shall order them to be brought in."

Controversy means dispute. 1 Bouv. Law Dict. (Rawle's Rev.) 431; 2 Words & Phrases, 1553.

The controversy between the plaintiffs and the defendant in this action arises over these questions: (1) Did the defendant employ the plaintiffs to procure a purchaser for its real estate? (2) If so, did plaintiffs procure such a purchaser? (3) If they did, what compensation should they receive? It is very plain that it is not necessary to bring any third party before the court for *his* protection while these three disputed questions of fact which form the subject of controversy between plaintiffs and defendant are being litigated. It is not claimed that any other person was a party to the contract between plaintiffs and defendant. One asserts that a contract was made; the other denies it. One asserts that acting under the contract a purchaser was found and compensation was earned; the other denies this also. The settlement of these mooted questions cannot prejudice the right of a person not a party to the action to claim under another and an entirely different contract. So it seems clear that the controversy between these parties can be settled without "prejudice to the rights of others," and that the first clause of the quoted portion of the statute does not help the defendant. The "others" therein referred to of course means persons who are not parties to the action.

If the court has a correct conception of what the controversy between the parties is, then it is patent that a full and "complete determination" of that controversy can be had without the presence of any other party, and that no person who is not a party has any interest therein which requires that he be made a party for his protection. Every defense is available to the defendant that it would have if *Feasley* were be-

fore the court. It may show that it made no contract such as is claimed by the plaintiffs, and, further, that if such a contract was made the plaintiffs earned nothing under it because the purchasers were not found by the plaintiffs but were found by another party.

The material part of sec. 2656*a* is as follows:

"A defendant or a person interpleaded or intervening may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action."

The material part of the portion of the statute quoted might be condensed so as to read as follows: "A defendant . . . may have affirmative relief against . . . a person not a party . . . upon his being brought in; but . . . such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action."

We think this statute does not apply because the defendant is not entitled to any affirmative relief in this action against *Feasley*. It is true, it attempts to set up an equitable counterclaim, but that counterclaim states no cause of action against the plaintiffs or against *Feasley*.

Furthermore, the *relief* sought does not affect the contract involved in this case. It does not even assist in determining whether or not that contract was made. It is perfectly competent for the defendant to show that *Feasley* claims to have procured or did procure the purchasers, without bringing *Feasley* in as a party. So the *relief* sought would neither assist in determining whether a contract had in fact been made or whether the plaintiffs had earned the money claimed thereunder if one was made.

Does the relief asked affect the *transaction* which is "the subject matter of the action?" A "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise. *McArthur v.*

Moffet, 143 Wis. 564, 128 N. W. 445. The making of the contract alleged in the complaint was the transaction out of which the cause of action arose in the instant case. We fail to see how the relief sought affects that transaction. Bringing *Feasley* before the court in the present case would not tend to show that an agreement such as is relied on was not made, as has been heretofore stated. If the term "transaction" be held to include not only the making of the contract but also performance on the part of the plaintiffs, the result would not be different. Offering proof to the court and jury that another party besides the plaintiffs in fact produced the purchasers would tend to show that plaintiffs should not recover. But the defendant can call *Feasley* and the purchasers in the trial of the present action and examine them fully without *Feasley* being a party to the action. So it is not apparent how the relief sought affects the transaction which is the subject matter of the action. The action is not brought in reference to *property,* so the use of that word in the statute does not affect the question under consideration.

The proceeding arises out of a fear on the part of the defendant that the juries impaneled in the actions may find for the plaintiffs in both of them, whereas if all the plaintiffs were before the court but a single recovery could be had. The situation presented is somewhat novel and one for which the lawmaking power has apparently made no provision that would warrant the practice here followed. This court has no power to make a new statute or to amend an existing one so as to reach a case of supposed hardship, or for any other reason for that matter.

By the Court.—The order appealed from is affirmed.

The following opinion was filed December 10, 1912:

WINSLOW, C. J. (*dissenting*). I respectfully dissent in this case because I think too limited a construction has been

given to sec. 2610, Stats. (1898); a construction which is not in harmony with the fair meaning of the words or the unquestioned intent of the code-makers. That intent was to make it possible for the trial court to grasp all branches of a single controversy in one action and dispose of it, thus saving time and money, and making it impossible for contradictory and unjust results to be reached by the verdicts of independent juries in separate actions. So the section says that other parties shall be brought in "when a complete determination of the controversy cannot be had" without their presence. The opinion of the court goes upon the theory that there are two controversies here, one between the defendant and the plaintiffs and one between the defendant and *Feasley,* which are separate and distinct, and that the presence of *Feasley* is not necessary to a complete determination of the controversy between the plaintiffs and the defendant.

The reasoning is faultless if the court's construction of the word "controversy" be right. Here is where it seems to me the court goes astray. A broad and liberal meaning should be given to the word if it be necessary to give effect to the paramount purpose of the act. The facts are that a piece of land belonging to the defendant was sold and that both the plaintiffs and *Feasley* claim to have procured the purchaser, while the defendant denies that either of them procured the purchaser. So far as the defendant is concerned, both claims are part of one fundamental question or controversy, namely, Did any person procure the purchaser? While this controversy is three-sided, as many controversies are, it is, in its largest aspect, one, namely, Was the sale in question a sale procured by agents, and, if so, by which agent? Giving the word "controversy" a reasonably liberal construction, it seems to me to cover the case and to require that both parties claiming the credit of the single sale be brought before the court in this action in order that there may be no possibility of a duplication of liability. The fact that the action is an action at

law interposes no obstacle, in view of the fact that nothing in the nature of equitable relief is involved in either claim, but simply claims for money judgments, which are peculiarly within the province of actions at law and can be easily disposed of in a single trial and by a single verdict.

SIEBECKER, J., concurs in the foregoing opinion.

JONES, Respondent, vs. PROVIDENCE WASHINGTON INSURANCE COMPANY and others, Appellants.
FRANKEL, Respondent, vs. AMERICAN CENTRAL INSURANCE COMPANY and another, Appellants.

November 22—November 23, 1912.

Supreme court: Superintending control of inferior courts: Jurisdiction of circuit court after appeal: Motion for new trial.

1. The power of "superintending control over all inferior courts," vested in the supreme court by sec. 3, art. VII, Const., may properly be used in aid of the appellate power when, without its use, a serious miscarriage of justice may probably occur.
2. As a general rule, after the supreme court has fully acquired jurisdiction by appeal from a final judgment, the trial court cannot take any action affecting in any way that judgment or the exclusive power of the supreme court to deal therewith.
3. Yet, after appeal and subject to the stay of proceedings imposed in aid thereof, there still remains in the circuit court a qualified jurisdiction at least, which may be called into activity by permission of the supreme court.
4. In a serious exigency, where justice seems to require it and no other remedy is adequate, the supreme court may properly, by virtue of its power of superintending control, suspend the operation of the stay for the time being and authorize a motion for a new trial to be made and decided in the circuit court, even though the result may be to set aside the judgment appealed from.

APPEALS from judgments of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge.

The appellants in each case, on November 22, 1912, moved that the record therein be remitted to the trial court.

A. R. Barry, for the appellants.

C. E. Armin, for the respondents.

The motions were granted on November 23, 1912, and the following opinion was filed December 10, 1912:

WINSLOW, C. J. These cases having come here by appeal from judgments in favor of the plaintiffs on fire insurance policies, motions are now made by the appellants to remit the records in both cases to the trial court for a limited time, in order that the appellants may make motions to set aside the verdicts and judgments and to grant new trials in that court based on affidavits setting forth very fully the discovery of evidence since the appeals were taken, showing that the insured buildings were destroyed by fire deliberately set by the insured as the result of a conspiracy to defraud the defendant insurance companies. The appellants resort to this method of procuring a return of the records to the trial court instead of dismissing their own appeals, because the judgments against them were rendered more than sixty days since and they fear that if they dismiss their appeals they will incur the heavy forfeitures prescribed by sec. 1974, Stats. (Supp. 1906), against any insurance company which continues to do business without paying a judgment against it, or prosecuting an appeal therefrom within sixty days after the rendition of the judgment.

The defendants' counsel interposed no objection to the motion; in fact he very properly consented that the order might be made at once. But as it seemed that there might be a question of jurisdiction involved we took time before making the order to consider that subject.

We do not now decide whether, in case of dismissal of the appeals, there could be a conviction under the statute cited for doing business pending the hearing and decision of the motion for a new trial. If the statute be construed literally it seems that there could be, and at least it is clear that there might easily be troublesome and expensive prosecutions brought which, if successful, might compel the payment of greater sums by way of forfeitures than the judgments here involved. The affidavits filed make a strong *prima facie* case for a new trial, and clearly the defendants ought, if possible, to be given the privilege of making their motions in the trial court without incurring the risk of losing more than they could possibly gain. These considerations have led us to carefully examine the question whether, after an appeal has been taken from a final judgment and the record transmitted to this court, the trial court has jurisdiction to make any order in the cause which may affect the judgment, even if this court transmits the record to the trial court so that the same is physically present when the order is made. This court has frequently remitted the record to the trial court after an appeal has been duly taken in order that the court below might, on motion, correct the bill of exceptions or make other minor but necessary additions to the record, and this court has for years recognized *sub silentio* the power of the trial court, after the appeal has been duly taken and the record sent here, to make an entire bill of exceptions and transmit the same to this court by supplemental return.

These matters, however, may well be considered as merely incidental or subsidiary proceedings and perhaps of a different nature from the order which is desired in the present case, namely, an order by which the judgment appealed from will be set aside and the subject matter of the appeal practically taken from the hands of this court after it has acquired full jurisdiction of the case, and that, too, by an inferior court.

The exact question here presented has not been met before so far as our investigation shows. It has been said by this court that "the appeal removes the subject matter, and all matters connected therewith, to this court, and is henceforth within its control" (*Waterman v. Raymond,* 5 Wis. 185); also that "this court . . . cannot recognize the right of the lower court to dispose of cases that have been removed to this court in the way pointed out by statute" (*Congregation, etc. v. Hellstern,* 105 Wis. 632, 81 N. W. 988), and that "both courts cannot have jurisdiction over the cause" (*Ott v. Boring,* 131 Wis. 472, 487, 110 N. W. 824, 111 N. W. 833).

While none of the cases cited attempt to pass authoritatively upon the question before us, the implication is quite clear that this court has acted generally upon the assumption that after jurisdiction had been fully obtained here by appeal from a final judgment the trial court could not take any action affecting in any way that judgment or the exclusive power of this court to deal therewith.

We see no necessity for questioning that proposition in this case. Here the trial court has not attempted to take any action in the case, but application is made to this court for an order transmitting the records to the trial court and directing that court to hear and decide a motion for new trial; no other court having power to pass upon such a motion and a sufficient showing of diligence having been made to excuse the delay.

If this court has power to make such an order it seems that it must be by virtue of the constitutional grant of "a general superintending control over all inferior courts." Sec. 3, art. VII, Const. This jurisdiction has been called "high and transcendent," and said to be as "broad as the exigency of the case demands." *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. It is ordinarily used to compel inferior courts to take action within their powers or to

prevent them from taking action outside of their powers where there is no other adequate remedy, the exigency grave, and the application prompt. It was clearly given to this court with the intention of thereby clothing the court with the most ample power to do justice in every controversy which might legitimately be brought before it. When the proper showing is made, no reason is perceived why it may not properly be used in aid of the appellate power when without its use a serious miscarriage of justice may probably occur, as in the present case.

If it be said that this is an attempt by this court to confer jurisdiction upon the circuit court when it has none by law, the reply is that, notwithstanding the positive language used in the cases cited, it has been recognized for many years that there is a qualified jurisdiction after appeal still remaining in the circuit court which may be called into activity by permission of this court. It may be said further that nowhere do the appeal statutes say expressly or by fair implication that the trial court entirely loses jurisdiction of an action after appeal. The implications are rather the other way. An appeal is fully perfected by the giving of the notice and bond for costs, but further proceedings are not stayed in the trial court unless an undertaking to stay them be given. Even when this last named undertaking is given the effect is to stay action on the judgment or order appealed from, and the court is at liberty to proceed "upon any other matter included in the action not affected by" such judgment or order. Sec. 3066, Stats. (1898). So it is clear that jurisdiction in a qualified sense at least remains in the trial court subject to the stay of proceedings imposed in aid of the appeal.

While the question is not free from difficulty, we reach the conclusion that in a serious exigency like the present, where justice seems to require it and no other remedy is adequate, this court may properly, by virtue of its power of superin-

tending control over inferior courts, suspend the operation of the stay in the inferior court for the time being, and authorize a motion for new trial to be made and decided, even though the result may be to set aside the judgment appealed from.

By the Court.—The motions are granted.

The records having been remitted to the circuit court, that court granted the motion for a new trial in each case; and thereafter, on December 10, 1912, the appeal in each case was dismissed by stipulation, with costs against the respondent.

MEYER, Administratrix, Respondent, vs. MENOMINEE AND MARINETTE LIGHT AND TRACTION COMPANY, Appellant.

October 11—December 10, 1912.

Negligence: Electric lighting wires: Location and condition: Death of boy: Licensee or trespasser: Liability of lighting company.

A boy about fourteen years old, while upon the top of a lumber pile, took hold of defendant's electric lighting wires and was killed. The lumber pile had for a year stood adjacent to a much traveled private road through a lumber yard, was about twenty-four feet high and was easy of access by children, steps to the top of the pile being formed by projecting boards. For many years lumber had been piled to about the same height at that place, and some fifty children living near by were accustomed to play upon the piles. The wires, which were strung upon poles along the side of the road, passed over the pile in question twenty-one inches above its top. There was evidence that they were very slack, sagging much more than is customary; that where they passed over the pile the insulation was worn or rotted off; that defendant had been notified and warned of the condition of the wires and poles about eight months before the accident; and that it knew or ought to

have known that children were likely to be upon the lumber pile. *Held*, that the jury were warranted in finding that defendant was negligent in the use of its wires so placed and strung, and that it ought reasonably to have anticipated that some child would be injured thereby; and, there having been no contributory negligence on the part of the deceased or his parents, a recovery was properly had against the defendant, although the boy was a bare licensee or invitee upon the lumber pile.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

This action was brought to recover damages for the death of a boy about fourteen years of age who came in contact with the highly charged wires of the defendant. The accident occurred on what is known as Hamilton and Merryman Company Island in the city of Marinette, where the Republic Lumber Company as lessee was engaged in the lumber business. The defendant's wires extended across a lumber pile where the boy was at the time he came in contact with the wires.

The negligence charged, in substance, is that the defendant disregarded its duties in many respects, and among others that it negligently erected poles and strung electric wires upon poles which were so short that the electric wires carrying high voltage and deadly and dangerous electric currents were but twenty-six feet three inches above the ground at the point where the same passed over the lumber pile in question, and failed and neglected to inspect said wires, poles, and fastenings, and failed to keep the wires, poles, and fastenings in repair, and negligently and carelessly permitted the wires to become slack and sag down, and permitted the insulation on said wires to become rotten and worn off, and suffered said wires to become so slack and so sagged down as to be but one foot nine inches above the top of the lumber pile in question, and that said poles were set 169 feet apart at the place in question; that the poles by the exercise of ordinary care could

have been erected so that the wires would have remained at least seven feet or more above the top of the lumber pile.

The jury returned the following verdict:

"(1) Was said Francis Meyer, deceased, killed by a shock received from one of the defendant's electric light wires, which he took hold of while on the top of a lumber pile? *A.* Yes (by court).

"(2) Was said wire as then charged, placed and strung dangerous to children being on top of said pile? *A.* Yes.

"(3) Was said defendant negligent in using said wire so charged, placed and strung at the time and place of the death of said deceased? *A.* Yes.

"(4) Ought the defendant, in the exercise of ordinary care, to have reasonably anticipated that by using said wire, so charged, placed and strung, some child would be injured thereby? *A.* Yes.

These three questions require no answers if you should answer the second question "Yes."

"(5) If you should answer the second question 'No,' then answer this: Was said death caused by any defect in the condition of the insulation of said wire, at the place where the deceased took hold of it? *A.* ——.

"(6) If you should answer the fifth question 'Yes,' then answer this: Was the defendant negligent in using said wire at that place with such defective insulation? *A.* ——.

"(7) If you should answer the sixth question 'Yes,' then answer this: Ought the defendant, in the exercise of ordinary care, to have reasonably anticipated that by using said wire with such defective insulation it would cause some child to be injured thereby? *A.* ——.

"(8) Was said deceased Francis Meyer guilty of any want of ordinary care which contributed to his injury and death? *A.* No.

"(9) Was Joseph Meyer, the father of said deceased, guilty of any want of ordinary care which contributed to the injury and death of said Francis Meyer? *A.* No.

"(10) Was the mother of said Francis Meyer, deceased, guilty of any want of ordinary care which contributed to the injury and death of said Francis? *A.* No.

"(11) At what amount do you assess the damage of the plaintiff father and mother resulting from the death of their said son, Francis? *A.* $1,500."

The usual motions were made by the defendant to change the answers of the jury to questions in the special verdict, for judgment upon the verdict as changed, and for a new trial, which were denied, and judgment entered for the plaintiff upon the verdict, and the defendant appealed.

The cause was submitted for the appellant on the brief of *E. W. Miller,* attorney, and *F. J. Trudell,* of counsel, and for the respondent on that of *E. C. Eastman.*

On behalf of appellant the following, among other cases, were cited: *Cahill v. Layton,* 57 Wis. 600, 16 N. W. 1; *Hector v. Boston E. L. Co.* 161 Mass. 588, 37 N. E. 773; *Sheffield Co. v. Morton,* 161 Ala. 153, 49 South. 772; *Freeman v. Brooklyn Heights R. Co.* 54 App. Div. 596, 66 N. Y. Supp. 1052; *McCaughna v. Owosso & C. E. Co.* 129 Mich. 407, 89 N. W. 73; *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Stark v. Muskegon T. & L. Co.* 141 Mich. 575, 104 N. W. 1100; *Keefe v. Narragansett E. L. Co.* 21 R. I. 575, 43 Atl. 542; *Rodgers' Adm'r v. Union L., H. & P. Co.* (Ky.) 123 S. W. 293; *Commonwealth E. Co. v. Melville,* 210 Ill. 70, 70 N. E. 1052, 1055; *Greenville v. Pitts,* 102 Tex. 1, 107 S. W. 50, 14 L. R. A. N. S. 979; *Mayfield W. & L. Co. v. Webb,* 129 Ky. 395, 111 S. W. 712, 18 L. R. A. N. S. 179; *Cumberland T. & T. Co. v. Martin's Adm'r,* 116 Ky. 554, 76 S. W. 394, 63 L. R. A. 469.

KERWIN, J. The only question presented on this appeal is whether there is sufficient evidence to support the verdict. It was established upon the trial that the Hamilton and Merryman Company and the Republic Lumber Company, its lessee, had for many years carried on a sawmill and lumber manufacturing business on what is known as Hamilton and Merryman Company Island, in the city of Marinette; that tram-

ways were constructed leading from the sawmill to distant portions of the lumber yard upon which lumber was hauled and placed in piles adjacent to said tramways; that said tramways were from thirteen to fourteen feet high; that the lumber piles were from twenty-four to twenty-six feet high; that the lumber pile in question was erected one year before the death of Francis Meyer and was twenty-four feet six inches high, and that lumber had been piled to the height of about twenty-four feet six inches at this point for some ten years previous to the death of said Meyer; that electric light wires of defendant had been strung upon poles in the lumber yard for nine or ten years prior to the accident; that the wires crossing this lumber pile were attached to a pole eighty-eight feet east of the pile thirty-six feet above the ground, and to a pole eighty-one feet west of the pile twenty-three feet above the ground, making a span of 169 feet, and the wires were so loose and sagged as to be only one foot nine inches above the top of the lumber pile. There was also credible evidence that the wires were very slack and should have been tighter, that the span of 169 feet between the poles allowed a greater sag than is ordinarily and customarily allowed in stretching electric wires of that character, and that the insulation was worn or rotted off from the wires where they passed over the lumber pile in question. The evidence further shows that a great many children had been in and about this lumber yard for many years before the accident, and that about fifty children ranging in ages from six to fifteen years lived with their parents in and about this lumber yard at the time of the death of said Francis Meyer, and that such children were accustomed to play about and upon the tramways and lumber piles, including the pile in question; that deceased lived with his parents about ninety feet from the lumber pile in question; that a plank road some sixteen feet wide ran through a portion of the leased premises and was used by the lumber company in conveying lumber from its mill, and the lumber was piled on

either side of said road; that the two wires in question were about twenty-eight inches apart and each carried 2,300 voltage; that this plank road, while not a duly laid out street, was traveled by a great many people aside from the employees of the lumber company, and the poles and wires were erected along the south side of this road; that the lumber pile in question was immediately adjacent to this road and easy of access by children, there being steps on the side of the pile by boards protruding close to the plank road and extending to the top of the pile; that defendant was notified and warned as to the condition of the wires and poles in September, 1909, the fall before the death of Francis Meyer, which death occurred in May, 1910.

The main contention of counsel for appellant, as we understand it, is that the defendant owed deceased no duty, he being a mere trespasser, and further that the element of reasonable anticipation necessary to make a case of actionable negligence was wanting, hence there could be no recovery. The deceased was on top of the lumber pile, took hold of the wires, one in each hand, and was instantly killed. Counsel for appellant say they have found no case "where recovery was had by reason of the taking hold of electric wires." *Lomoe v. Superior W., L. & P. Co.* 147 Wis. 5, 132 N. W. 623, is directly against appellant upon this proposition.

Counsel for appellant rely mainly upon adjudications from foreign jurisdictions. While it may be difficult to reconcile all decisions upon the subject, the confusion, or seeming confusion, results more from failure to fully appreciate the distinction upon facts than from any conflict in propositions of law upon the same state of facts. This we think will appear obvious from an examination of the cases cited by appellant from other jurisdictions. Cases may be found where one cannot recover for injuries sustained while trespassing, while others may be found holding that the mere fact that plaintiff was trespassing on the defendant's property when injured will

not in all cases bar recovery. So, too, it has been held that a bare licensee or invitee may recover for injuries sustained while on the defendant's premises caused by the defendant's negligence. In *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219, plaintiff, a child, was injured while playing upon a lumber pile situate on the highway adjacent to defendant's premises, yet it was held that recovery could be had for the injuries sustained through the negligence of the defendant. See, also, *Connell v. Keokuk E. R. & P. Co.* 131 Iowa, 622, 109 N. W. 177. But whether deceased in the instant case was a bare licensee or invitee when upon the lumber pile, if defendant knew or ought to have known that boys of his age were accustomed to be there, it was chargeable with due care in the management of its poles, wires, and current so as to protect children and others who might be expected to be there from injury, and was bound to anticipate that some injury might result to some one in consequence of the location and condition of the wires. *Nagle v. Hake,* 123 Wis. 256, 101 N. W. 409; *Wilbert v. Sheboygan L., P. & R. Co.* 129 Wis. 1, 106 N. W. 1058; *Lomoe v. Superior W., L. & P. Co., supra; Bright v. Barnett & R. Co.* 88 Wis. 299, 60 N. W. 418; *Burnett v. Ft. Worth L. & P. Co.* (Tex. Civ. App.) 117 S. W. 175; *Temple v. McComb City E. L. & P. Co.* 89 Miss. 1, 42 South. 874, 11 L. R. A. N. S. 449; *Powers v. Harlow,* 53 Mich. 507, 19 N. W. 257; *Connell v. Keokuk E. R. & P. Co.* 131 Iowa, 622, 109 N. W. 177; *Daltry v. Media E. L., H. & P. Co.* 208 Pa. St. 403, 57 Atl. 833; *Ambroz v. Cedar Rapids E. L. & P. Co.* 131 Iowa, 336, 108 N. W. 540; *Braun v. Buffalo G. E. Co.* 200 N. Y. 484, 94 N. E. 209; *Quinn v. Delaware & A. T. & T. Co.* 72 N. J. Law, 276, 62 Atl. 412, 3 L. R. A. N. S. 988.

In the case at bar the evidence was ample to warrant the jury in finding that for a long time before the accident the defendant knew, or ought to have known, that children were likely to be upon the lumber pile and be injured by contact with the wires, and that defendant was guilty of negligence in

the use of its wires at the time and place of the death of the deceased. There is also sufficient evidence to entitle the jury to find that neither the deceased nor his parents were guilty of contributory negligence. In many of the cases cited by appellant's counsel the danger was not reasonably to be apprehended, and most if not all of them are readily distinguishable from the case at bar. It would serve no useful purpose to discuss them. Perhaps one of the strongest cases cited in support of appellant's contention is *Cumberland T. & T. Co. v. Martin,* 116 Ky. 554, 76 S. W. 394, 63 L. R. A. 469, decided in 1903; and this case is out of harmony with a later decision of the same court, *Rodgers' Adm'r v. Union L., H. & P. Co.* (Ky.) 123 S. W. 293, decided in 1909.

There are no exceptions to the charge or objection to the special verdict, and no request was made for further findings. We think the judgment of the court below is right and should be affirmed.

By the Court.—The judgment is affirmed.

McNear, Administratrix, Respondent, vs. Mitchell-Lewis Motor Company, Appellant.

October 11—December 10, 1912.

Master and servant: Death from explosion of gas oven: Proximate cause: Dangerous conditions: Warning: Assumption of risk: Contributory negligence: Questions for jury.

1. While the foreman of the assembling department in defendant's automobile factory was holding a lantern up to a small hole in the side of a gas enameling oven, which was under his charge, in order to read a thermometer which hung in the oven opposite the hole, an explosion occurred and he was killed thereby. The oven was not equipped with any pipe or flue through which the products of combustion, the smoke and fumes from baking enamel, and any unconsumed fuel gas

could escape to the outer air, and such vents as existed were kept nearly closed while the oven was being used, with the result that the accumulated products of combustion might smother the burning gas and thereafter unconsumed fuel gas would escape and form an explosive mixture in the oven. Upon evidence tending to show, among other things, that an equipment of pipes and flues to the outer air would have increased the draft and have removed any undue accumulation of gaseous products, the jury were warranted in finding that the defective and dangerous condition of the oven, due to lack of such equipment, was the proximate cause of the death.

2. Whether the deceased knew and appreciated, or ought to have known and appreciated, the danger incident to operating the oven in such condition and in the manner in which it was operated, and hence assumed the risk; whether defendant was negligent in failing to instruct or warn him as to such danger; and whether he was guilty of contributory negligence in bringing a lighted lantern near to the opening in the oven, were also, upon all the evidence in the case, questions for the jury.

APPEAL from a judgment of the circuit court for Racine county: F. C. ESCHWEILER, Judge. *Affirmed.*

The plaintiff, as administratrix of her husband's estate, brings this action to recover damages for the death of her husband, who was killed by the explosion of a gas enameling oven in the factory of the defendant on the night of March 6, 1911, about 9:35 o'clock in the evening. The complaint alleges negligence on the part of the defendant in three respects: The oven was defective and dangerous in construction, in that it had no smokestack running from the interior of the oven through the factory roof to the outer air. The defendant failed to warn the deceased of the dangerous character of the construction of the oven. The defendant failed to instruct the deceased as to how to operate the oven safely.

The deceased was killed by an explosion of accumulated gas in the oven, which occurred while he held a lantern in front of a hole in the oven in order to see the temperature as indicated by a thermometer which hung in the oven opposite the hole. The evidence tends to show that the accumulation of unconsumed gas in the oven was the natural result of the

fact that the oven vapors and gas had not been removed to the outer air through a stack and as a consequence had accumulated in the oven and smothered the burning gas and the gas had then escaped into and accumulated in the oven.

The evidence introduced on the trial of the action tends to establish the following facts:

The defendant is engaged in the manufacture of automobiles at its factory in the city of Racine, Wisconsin.

The deceased was born on a farm in West Virginia. He attended a country school, became a clerk in a grocery store, worked in a hardware store in which they did repair work on bicycles, became a partner in a bicycle repair shop wherein a small gas oven was used for enameling bicycles, then became a workman in a bicycle factory, finally entered defendant's employ as an ordinary mechanic, and in the course of five or six years became foreman of the assembling department, the position he held at the time of his death. He had no technical education, but seemed to have a natural mechanical bent and was an intelligent and capable man. At the time of his death he was thirty-nine years of age and was earning $175 per month. His widow and two children survive him.

As foreman of the assembling department the deceased had general charge of a room about 300 feet long and 180 feet wide. In the busy season of the year about 100 men would be engaged in this department. The work of the department consisted in assembling the parts of the framework of the automobiles and putting them together into what is known as the "chassis," and in testing the engines.

Until about two months before the date of the accident all of the enameling done in the defendant's factory was done in the painting department under the foreman of that department. In the process of enameling, the article to be enameled is first dipped into the enameling liquid and is then baked. In the painting department the defendant had eight or ten ovens to bake the enamel. These ovens were made of

two thicknesses of sheet iron with a layer of asbestos between, and were about seven feet high, seven feet wide, and fourteen feet long. They had stacks connecting the interiors with the outer air.

In order to avoid trucking from the assembling room to the painting department, in the fall of 1910 two gas ovens for enameling, of the same size and construction as those in the painting department, were constructed and erected in the southeast corner of the assembling room. A space of about three feet separated the ovens. The doors, occupying practically all of the end of the ovens, were on the north side. Four or five feet from the front of the ovens a two-inch supply pipe for gas came down from above into the space between the ovens. In each of these supply pipes, four or five feet from the floor, was a valve or shut-off to control the gas. Each supply pipe was supplied with a Bunsen burner, a device for mixing air with the gas before combustion, which results in more perfect combustion and greater heat. In the interior of the ovens near the floor were two pipes running the full length of the ovens, each with four rows of perforations about one-half inch apart, which were the burners. In the center of the top of each oven was an opening about eight inches square, over which fitted a pipe or sleeve having a damper which could be controlled from the space between the ovens. The pipes on the tops of the ovens opened into the assembling room and did not connect the interiors of the ovens with the outer air. About five feet from the floor and midway the length of the oven which was in the corner of the room was a small hole cut in the side of the oven so that a thermometer hanging in the interior of the oven might be seen from the space between the ovens. This hole in the oven which exploded was originally covered with glass, but the glass had become broken and was replaced by a piece of metal. There was some evidence that the oven which stood in the corner, which was the one which exploded, had but

two draft openings three and one-half inches in diameter, that these were insufficient, and that there should have been three. About two months prior to the accident the superintendent of the defendant's plant placed the operation of these two ovens under the charge of the deceased and directed him to go to Mr. Wade, the foreman of the painting department, for any information he might need as to the operation of the ovens.

The process of enameling is as follows: The articles to be enameled are dipped in the enameling liquid, composed of oils, lamp black, and turpentine, and the liquid is permitted to drain off. The articles are then placed in the oven, the gas is turned on and lighted, the doors are closed, and the drafts at the bottom of the oven are opened. The ovens are raised to a temperature of somewhat over 300 degrees and the process takes about three hours. In the painting department it was customary to open the damper in the pipe connecting the interior of an oven with the outer air and thus allow the escape of the products of combustion and the dark, acrid, ill-smelling smoke or gas which was caused by heating the enameling liquid. In an hour or an hour and a half the fumes from the enameling liquid would cease to rise and the damper in the vent would be nearly closed and the heat retained in the oven.

There was evidence in the case that the opening of the dampers in the vents of the oven in the assembling room permitted the noxious fumes created by heating the enameling liquid to escape into the room and that complaint was made by the men working therein, and for this reason it was necessary to keep the vents in the ovens in this room nearly closed while these fumes were being given off. Obviously, the greater the quantity of material in the oven the greater the amount of fumes given off by heating the enameling liquid.

The deceased had been referred to Mr. Wade, the foreman of the painting department, for information regarding the

operation of the ovens, and Mr. Wade had told him how to prepare the enameling liquid, how much heat to give the ovens, and how long to continue the baking. There is evidence that during the two months deceased had charge of the ovens he complained to Mr. Wade several times that the gas had become extinguished during the process of baking, but it does not appear that he understood what caused it or that Mr. Wade gave him any information on the subject. There was evidence that he had said that the ovens were getting the better of him and that he was afraid of them. The superintendent and manager of the defendant's plant considered the operation of the ovens to be a simple matter, no more difficult than the operation of the ordinary gas stove. It appears that instructions had been given the men by the deceased that they should not go near the ovens with an open light or while smoking.

Shortly before 6 o'clock on the evening of the day of the explosion the oven had been well filled with material to be enameled. The gas was lighted, the drafts fixed, the doors closed, and, as was customary, the time (9:30) when the night watchman was to turn off the gas was marked on the oven door. At about 9:30 o'clock the watchman, who came on duty at 6 o'clock, was making his third round. He set his lantern down in front of the oven, went in between the two ovens, turned off the gas from the oven, and then rubbed the figures off of the oven door. While he was doing these things the large door in the east wall of the assembling room opened and the deceased drove into the room in his automobile. The watchman had been directed to admit the deceased into the factory at any time at night, and he called to the deceased to wait a minute. The deceased waited in his car while the watchman went to the light switches near the door, where he first turned on a light far down the room and away from the ovens. He extinguished this light and lighted another about fifty feet from the ovens. The deceased made

some remark about that being all right, that he had plenty of light, and taking up the watchman's lantern walked between the ovens to the place where the thermometer hung in the oven. He raised the metal slide over the hole and lifted up his lantern so that he might see the thermometer. An explosion followed and the plaintiff's intestate was killed thereby. His watch was found on his person; it had stopped at 9:35 o'clock.

The evidence shows that the small oven, heated by gas, which the deceased operated when he was engaged in the bicycle repair business, was without a vent to allow the escape of the noxious fumes caused by heating the enamel, that the gas burned under the oven, but that unconsumed gas might get into the oven through holes in the bottom, and that there had been gas explosions in the operation of this oven while he operated it.

There was evidence that at the request of the deceased an incandescent light had been suspended from the roof of the assembling room so that it hung between the two ovens in such a position that the thermometer could be read by its light. The watchman testified that the light had not been in running order for several days before the explosion. There was also evidence that the wires carrying the current to this light were all right immediately after the explosion.

The testimony of a chemist in plaintiff's behalf was to the effect that the explosion was due to an accumulation of unconsumed fuel gas in the oven; that the unconsumed gas had accumulated in the oven because the flames in the oven had been smothered by the gases caused by combustion of the fuel gas and the smoke and fumes caused by heating the enamel; and that these smothering gases remained in the oven because of insufficient or defective ventilation of the oven.

The watchman testified that he had not detected the odor of unconsumed fuel gas about the oven while he was shutting off the gas and rubbing off the figures from the oven door immediately before the explosion.

The jury returned the following verdict:

"(1) Was the oven which exploded, in the place and for the purpose for which it was being used at the time of the death of Frank B. McNear, defective and dangerous by reason of not being equipped or connected with any additional flue or pipe to carry off the products of combustion and the smoke and fumes arising from the baking of the enamel? *A.* Yes.

"(2) If your answer to the first question be 'Yes,' then answer this: Ought the defendant in the exercise of ordinary care to have known that said oven was in such defective and dangerous condition before the explosion which caused the death of said Frank B. McNear? *A.* Yes.

"(3) If you answer the first and second questions 'Yes,' then answer this: Was such defective and dangerous condition the proximate cause of the death of said Frank B. McNear? *A.* Yes.

"(4) If you answer the first question 'Yes,' then answer this: Did the defendant, before the death of said Frank B. McNear, negligently fail to instruct or warn him in respect to the dangers incident to the operation of said oven at the place and for the purpose for which it was being operated? *A.* Yes.

"(5) If you answer the fourth question 'Yes,' then answer this: Was said negligence of defendant the proximate cause of the death of said Frank B. McNear? *A.* Yes.

"(6) Did the said Frank B. McNear know and appreciate the dangers incident to the operation of said enameling oven in the manner he did operate it and in the condition the evidence shows it to have been? *A.* No.

"(7) If you answer question 6 'No,' then answer: Ought the said Frank B. McNear, in the exercise of ordinary care, to have known and appreciated the dangers incident to the operation of said enameling oven in the manner he did operate it and in the condition the evidence shows it to have been? *A.* No.

"(8) Ought the deceased, Frank B. McNear, considering his age, intelligence and experience, in the exercise of ordinary care, to have reasonably understood and appreciated before his injury the danger of an explosion by bringing a lighted lantern near the oven in question? *A.* No.

"(9) Was the said Frank B. McNear guilty of any want of ordinary care which proximately contributed to his death? *A.* No.

"(10) At what sum do you assess the plaintiff's damages? *A.* $10,000."

This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Cavanagh & Barnes,* attorneys, and *Martin J. Gillen,* of counsel, and oral argument by *C. D. Barnes.* They cited *Hynes v. Holt L. Co.* 147 Wis. 172, 132 N. W. 889; *Naylor v. C. & N. W. R. Co.* 53 Wis. 661, 11 N. W. 24; *Stephenson v. Duncan,* 73 Wis. 404, 41 N. W. 337; *Paule v. Florence M. Co.* 80 Wis. 350, 50 N. W. 189; *Hazen v. West Superior L. Co.* 91 Wis. 208, 64 N. W. 857; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Schmitt v. Hamilton Mfg. Co.* 135 Wis. 117, 115 N. W. 353; *Hocking v. Windsor S. Co.* 125 Wis. 575, 104 N. W. 705; *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059; *Vallée ès qualité v. New City G. Co.* 7 Am. Law Rev. 767; *Brown v. New York G. L. Co.* Anthon, N. P. 2d ed. (N. Y.) 351; *Lebanon L., H. & P. Co. v. Leap,* 139 Ind. 443, 39 N. E. 57, 29 L. R. A. 342; *Lanigan v. New York G. L. Co.* 71 N. Y. 29; *Guile v. La Crosse G. & E. Co.* 145 Wis. 157, 130 N. W. 234.

For the respondent there was a brief by *Simmons & Walker,* and oral argument by *John B. Simmons.* They argued, among other things, that the master is bound to know and to warn the servant of dangers arising from scientific facts and laws. *Adams v. G. R. R. Co.* 160 Mich. 590, 125 N. W. 724, 19 Am. & Eng. Ann. Cas. 1152 and note, 27 L. R. A. N. S. 953; *Smith v. Peninsular Car Works,* 60 Mich. 501, 27 N. W. 662; *Ribich v. Lake Superior S. Co.* 123 Mich. 401, 82 N. W. 279; *Herring v. E. I. Du Pont de Nemours P. Co.* 139 Wis. 412, 121 N. W. 170; *Rankel v. Buckstaff-Edwards Co.* 138 Wis. 442, 120 N. W. 269; *Ruick v. Milwaukee B. Co.* 144 Wis. 404, 129 N. W. 414; *Ramsey v. Raritan C. Works,*

78 N. J. Law, 474, 74 Atl. 437; *Redmund v. Butler,* 168 Mass. 367, 47 N. E. 108; *Holland v. Tennessee C., I. & R. Co.* 91 Ala. 444, 8 South. 524, 12 L. R. A. 232; *Consolidated C. Co. v. Haenni,* 146 Ill. 114, 35 N. E. 162; *Hysell v. Swift & Co.* 78 Mo. App. 39; *Scagel v. C., M. & St. P. R. Co.* 83 Iowa, 380, 49 N. W. 990; and other cases. The servant has a right to know the precise danger which threatens him. *Jones v. Florence M. Co.* 66 Wis. 268, 279, 28 N. W. 207; *Kaczmarek v. Geuder, P. & F. Co.* 148 Wis. 46, 134 N. W. 348; *Fidelity T. Co. v. Wisconsin I. & W. Works,* 145 Wis. 385, 129 N. W. 615; *McDougall v. Ashland S. F. Co.* 97 Wis. 382, 73 N. W. 327; *Wolski v. Knapp-Stout & Co. Co.* 90 Wis. 178, 63 N. W. 87; *Fox v. Peninsular W. L. & C. Works,* 84 Mich. 676, 48 N. W. 203. Upon the question of deceased's contributory negligence they cited, among other cases, *Lee v. Troy Citizens' G. L. Co.* 98 N. Y. 115; *Finnegan v. Fall River G. Works,* 159 Mass. 311, 34 N. E. 523; *Schmeer v. Gaslight Co.* 147 N. Y. 529, 42 N. E. 202; *Stoner v. Pennsylvania S. Co.* 40 Pa. Super. Ct. 599; *Pine Bluff W. & L. Co. v. Schneider,* 62 Ark. 109, 34 S. W. 547; *Plonk v. Jessop,* 178 Pa. St. 71, 35 Atl. 851; *Schermerhorn v. Metropolitan G. L. Co.* 5 Daly, 144; *People's G. L. & C. Co. v. Amphlett,* 93 Ill. App. 194; *Baudler v. People's G. L. & C. Co.* 108 Ill. App. 187; *Laclede G. L. Co. v. Cottone,* 152 Fed. 629; *Cooke v. Baltimore T. Co.* 80 Md. 558, 31 Atl. 327; *Richmond v. Gay's Adm'x,* 103 Va. 320, 49 S. E. 482; *Apfelbach v. Consolidated G. Co.* 204 Pa. St. 570, 54 Atl. 359.

SIEBECKER, J. It is contended by the defendant that the evidence does not sustain the finding that the failure to equip the oven here in question with a pipe and flue connecting its interior with the outer air to carry off the products of combustion and the smoke and fumes was the proximate cause of the explosion, and it is averred that it was proximately caused by the manner of operating the oven, and that such operation of

the oven, even had it been equipped with such a pipe and flue, would have been as dangerous as it was as actually constructed. It appears reasonably clear that if the oven had been equipped with these pipes and flues, the products of combustion, the smoke and fumes, and the unconsumed gases would have escaped through them from the oven to the outer air. There is opinion evidence to the effect that the oven with such an equipment of pipes and flues would have operated more efficiently than without this equipment, for the reason that it would have improved and increased the draft and thus have removed any undue accumulation of such gaseous products from the oven. It seems that these inferences naturally followed from the facts and circumstances shown.

It is however insisted that the deceased knew, and under the facts shown must be held to have known, of the dangers incident to operating the oven by closing, or nearly closing, the top vent, as was done, and thus smothering the burning gas in this confined space. The facts and circumstances bearing on the deceased's knowledge of the danger of so operating the oven are not all one way on this question. The fact that the defendant furnished this appliance in a defective condition and directed the deceased to operate it as it was, implied that the defendant regarded it as safe for its purpose. It also appears that the deceased was referred to Mr. Wade, the foreman of the painting department, for instructions as to the operation of the oven and the performance of the duty of conducting the enameling process in the oven so furnished him. Nothing appears to show that he was informed by Mr. Wade of the danger that gases and fumes might collect in the oven and extinguish the burning gas if they were not carried off through vents. It appears that he complained to Mr. Wade that the fire had gone out while the oven was in operation and that he was told to see the person in charge of the gas appliances for defects in the gas fixtures. This clearly indicates that Mr. Wade and the deceased had not thought that the man-

ner of operating the oven caused the fire to be extinguished. It also appears that for some two months the oven had been operated as it was on the night of the explosion, and, except for the few times mentioned, the fire had kept alive throughout the usual period of from three to three and one-half hours, the time required to complete the baking of the enamel on the parts placed in the oven. The facts that the deceased directed that the oven doors should be opened for five minutes after the fire went out before it was relighted and that he warned others not to go near it with lighted pipes and lanterns do not indicate that he knew what caused the gas to cease burning, but only tends to show that he understood that when the oven was filled with unconsumed fuel gas it was liable to explode upon ignition. The facts and circumstances of the case warrant the inference that the deceased was not informed of the fact that the smoke, fumes, and gases emanating from the heated material in the oven and combustion might, under the existing conditions, smother the burning fires. Hence it was proper to submit this question for determination by the jury.

It is contended that the deceased must be held to have known that gas mixed with air is highly explosive upon ignition and that such a mixture would accumulate in the oven after the burning gas fire had become smothered and extinguished under the conditions under which this oven was being operated, and that therefore he was not entitled to be warned of such a danger; but that he assumed the risk of an explosion as a hazard of his employment, and hence that no recovery can be had for his death. The assumption that he must be held to have known the danger of explosion from gas mixed with air does not, under the circumstances of the case, establish that he assumed the risk thereof, unless the evidence conclusively shows that he knew, or ought to have known, of the existence of the gas in the oven at the time of accident. It appears, as indicated heretofore, that this danger does not accompany the operation of such an oven if it is properly con-

structed and operated. It is therefore not a hazard necessarily inhering in a properly conducted business. We have also shown that it was for the jury to determine whether the deceased knew, at the time of the accident, that the manner in which this oven was being operated would cause the smoke, fumes, and gases to accumulate therein and extinguish the burning fire, and that the jury were justified in negativing this inquiry. The appellant asserts, however, that the deceased, as a man of ordinary intelligence, knowledge, and experience in running this oven, must be presumed to have known of this danger, and hence assumed it as a risk of the business. This contention proceeds upon the assumption that the vent or escape at the top of the oven was wholly closed, and that when so closed it prevented a sufficient draft to supply air and oxygen to maintain combustion in the chamber. The evidence, however, is not conclusive on these points. It does not appear that the vent was wholly closed or that the draft to supply air was wholly checked; but it affirmatively appears that the oven was being operated on this evening as it had been operated ever since its installation, and that it usually had operated successfully. These facts and circumstances of the case do not permit the conclusive presumption of fact on which this contention rests, and hence the contention must fail.

But it is claimed that if this presumption does not prevail, still it must follow that the deceased was, under the existing conditions, apprised of this danger as an incident to operating the oven. Reliance as to this point is placed on the facts that he ordered his men not to go near the oven with an unprotected light, that, to avoid using matches, he ordered an incandescent light to be placed near the thermometer, that he expressed fear of the ovens, that he told those under him, whenever the fire in the oven went out, to open the front doors for five minutes before relighting the gas, and that, as to such an explosion, he had previous experience with a small enamel-

ing oven while conducting a bicycle repair business. This claim is not well founded, even conceding that all these facts appear, for they do not show that this danger was one necessarily incident to the employment of operating a properly constructed oven, and because the jury, upon the evidence adduced, had warrant to find as a fact that the deceased at the time of the accident did not know that this dangerous condition actually existed. It is, however, claimed that ignorance of these conditions cannot excuse the deceased, because it conclusively appears that the danger of explosion was a hazard inhering in the conduct of the business under the existing conditions, and that the deceased, as a man of ordinary intelligence and experience in such matters, knew, or must be held to have known, of its existence when he approached the oven with a lantern on the night in question. True, as claimed, the master may conduct his business in his own way, although another is less hazardous, and the servant assumes the risks thereof if he knows the dangers attending it. The deceased, however, was found to have been ignorant of the existing danger, and, upon the grounds already given, it cannot be held that he ought to have known of it. Hence he did not assume the risk.

The claim is urged that, if the case presented does not establish that the deceased assumed the risk of the danger which caused his death, it follows from the evidence as matter of law that he was guilty of contributory negligence. Many of the facts involved in the foregoing discussion of the assumption of risk bear on this inquiry, and what was there said as to their legal effect applies to this question. The jury have exonerated the deceased of the charge of any want of ordinary care which proximately contributed to his death. In addition to the facts heretofore considered, the evidence of the watchman as to what took place immediately preceding the explosion is important as bearing on this issue. It appears that this watchman was on his round of duty and had just

completed turning off the gas from this oven and erasing the chalk marks from the oven door when the deceased appeared in an automobile. The watchman called to him to wait for him to switch on a light. This he immediately proceeded to do by turning a switch, but the light was not near the door and he turned another switch. Deceased then spoke, saying that it would do, and he thereupon got out of the car, went toward the oven, taking the watchman's lantern from the floor in front of the oven, and went to the place at the side of the oven where the thermometer was located and held up the lantern to enable him to read the thermometer. In about a minute, as the watchman states, the explosion occurred. The watchman also states that the air was charged as usual with smells of the shop and oven, but that he did not distinguish the odor of unconsumed fuel gas. The chalk mark on the oven door, indicating that the gas was to be turned off at 9:30 o'clock, was erased. After the explosion the deceased's watch was found on his person and it was found to have stopped at 9:35 o'clock. Deceased's conduct in going to the opening in the side of the oven and in holding the lantern near the opening where the thermometer was located must be judged in the light of his knowledge of the existing danger. It appears that the time for turning off the gas had expired and that the gas had in fact been turned off. This naturally would lead the deceased to infer that conditions were normal and that there was no gas in the oven. The watchman's lighted lantern, the absence of a gas smell, and all the conditions as described by the night watchman, also indicated that no unconsumed gas had been discharged into the oven and that none had escaped into the room where the deceased and the watchman were. Under such conditions it cannot be held as matter of law that the deceased was apprised of the dangerous situation. His conduct clearly implies that he was acting on the assumption that his environment was free from impending danger, and he undoubtedly

thought the fire in the oven had continued to burn as usual until the watchman turned off the gas. In the light of his want of knowledge of the existing dangerous condition of affairs his conduct was that of an ordinarily prudent man. Furthermore, if we assume that he should have anticipated that the fire might possibly have been smothered in the operation of the oven, that cannot control in this case, because nothing was there to suggest to him the presence of gas, and therefore he had the right to act on the assumption that combustion had continued to the time the watchman turned off the gas. The nature of the acts and the conditions relied upon to show that the deceased was guilty of a want of care are not so clear as to show it *per se*. That fact can only be determined by a consideration of all the facts and surrounding circumstances of the case. It therefore properly comes within the province of the jury and their determination must control. We find no reversible error in the case.

The rules of law governing the case are elementary and so well understood that citation of authorities is unnecessary.

By the Court.—The judgment appealed from is affirmed.

WINSLOW, C. J., and MARSHALL and BARNES, JJ., dissent.

KOEPP, Respondent, vs. NATIONAL ENAMELING AND STAMPING COMPANY, Appellant.

October 29—December 10, 1912.

(1, 19) *Appeal: Errors, when disregarded.* (2, 3, 6, 7, 14–18) *Master and servant: Injuries from unsafe scaffold: Assumption of risk: Duty of master, how far absolute.* (4, 5) *Trial: Questions for jury.* (8–18) *Statutes: Construction: Rules: "Repairing:" "Scaffolding:" "Mechanical contrivance:"* Ejusdem generis. (19, 20) *Excessive damages: Option to remit part.*

1. Errors will not be regarded on appeal, fatally prejudicial, unless, from the whole record, it appears with reasonable clearness, that had they not occurred the result might, probably, have been materially more favorable to the complaining party.
2. If a scaffolding to be used by a servant is erected by him according to plans dictated by the master, the contrivance is furnished for such use within sec. 1636—81, Stats. (Supp. 1906: Laws of 1901, ch. 257).
3. Whether defects in a contrivance furnished within sec. 1636—81, are known to the servant so as to charge him with assumption of the risk, is a jury question in case of there being any reasonable ground for differences of opinion in respect thereto.
4. The decision in the affirmative as to whether a question is for the jury, involves a determination by the trial judge, as matter of fact, with superior opportunity to do so, that in reaching a final result a choice is required to be made between reasonably conflicting inferences, and, on appeal, all reasonable doubts must be resolved in favor thereof.
5. Since an initial decision in the affirmative as to whether a matter should be submitted to the jury involves a determination, as matter of fact, that, at the best for the moving party there is room in the evidence for a decision of the ultimate matter either way, in case of a wrong verdict the difficulty inheres in the submission.
6. Where the creation of a contrivance for use in a structural operation, involves use of expert knowledge, the master, in directing the manner of construction by his servant for the latter's use, is responsible for the special knowledge ordinarily devoted to such matters, and in case of the servant performing the work and using the contrivance, not possessing such knowledge, that has a bearing, and may have controlling weight, on the question of assumption of the risk.

7. Whether sec. 1636—81 of the Statutes,—prohibiting a master from furnishing or erecting, or causing to be furnished or erected, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, unsuitable, or improper and not constructed, placed, and operated so as to give proper protection to the life and limbs of the person whom he employs or directs to perform labor of any kind in the erection, repairing, altering, or painting of a house, building, or structure,—creates absolute duty and nonperformance is not excused by exercise of ordinary care in respect to the matter, depends upon legislative intent, not legislative power.
8. The legislative purpose in enacting a law, within constitutional limitations, must prevail, regardless of judicial notions as to wisdom of the enactment.
9. All judicial rules for construction of statutes are purposed to aid in discovering the intent of the lawmakers,—to use the same to minimize the effect of a statute or enlarge it out of harmony with such intent, is illegitimate.
10. Whether legislative language should be read restrictively, or literally, or liberally, within the limits of the reasonable scope thereof, depends, very much, upon the mischiefs intended to be remedied.
11. Nothing appearing to the contrary, the rule for determining the legislative purpose is to read an enactment as reasonably as practicable in restriction of its literal meaning as regards changing the common law.
12. A radical change of conditions characterizing two legislative enactments might require one to be read restrictively and the other liberally in order to give effect to the legislative intent; in the first instance, the general rule of strict construction against changes in the common law might apply, and, in the second, be displaced by such unmistakable indications as to require the contrary reading.
13. A statute, adopted from another state, after having been there construed by its highest court, must be presumed to have been taken as construed.
14. The rule last stated applies to sec. 1636—81, Stats., first enacted in New York and construed therein as not abrogating the defense of contributory negligence or assumption of the risk, but rendering the duty of the master, incapable of being delegated and unaffected by ordinary care or caution or discretion in selecting employees or furnishing material for the creation of the particular appliance.
15. The intent of the statute to make the master an insurer of the safety of his employees in respect to the particular matter, ex-

cept in case of their own efficient assumption of the risk of contributory negligence, is within constitutional limitations.

16. The language of the statute as to "repairing" includes any work of restoration to a former more perfect condition.

17. The words "scaffolding" and "mechanical contrivance" include any contrivance made of parts erected or used for support in or about the particular kinds of work mentioned in the statute.

18. The rule of *ejusdem generis* does not apply to the words of sec. 1636—81, Stats. Each word in the series descriptive of work and of contrivance, stands by itself unrestricted by any preceding or following word, and is to be read so broadly, within reason, as to afford full relief for the condition sought to be remedied.

19. Where the trial court acts upon a motion to set a verdict aside as excessive, passing upon both the question of whether it is characterized by passion or prejudice and whether, without such element, it is too large in view of the evidence, the result will not be disturbed on appeal unless manifestly wrong.

20. Where the trial court requires a party in whose favor a verdict for damages has been rendered to remit a part thereof as a condition of judgment, the presumption will obtain on appeal, there being no unmistakable indication to the contrary, that the reduced sum was placed as low, in the judgment of the trial judge, as any other jury of fair men, properly instructed, would be liable to find on the same evidence.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover for a personal injury.

Plaintiff, an employee of defendant, fell from an eleven-foot ladder standing on a platform, raised some twenty feet above the floor of the room where the operations were in progress, and resting against a beam so as to enable him to ascend within reach of the ceiling. The fall was caused by the supports of the platform collapsing. He was seriously injured. The allegations as to defendant's breach of duty were put in issue.

The evidence proved or tended to prove this: Plaintiff was injured as alleged. He was working for defendant as a steamfitter. He was earning, with allowances for overtime,

an average of $18 per week. He worked under one Heathcote, chief engineer. Orders were communicated from the latter to plaintiff, through one Miller, head electrician, to build a scaffold in the engine and electric generator room for use in washing down the ceiling of the room and painting. Thereupon and therefor he conveyed lumber to such room. He purposed building a stationary platform large enough to enable him to reach all parts of the ceiling. Heathcote ordered him to build a movable platform, using two 4x4 pieces of lumber twenty feet long standing upright, several feet apart, against the wall with a 2x6 short plank nailed to them about six inches below the top, and other planks supported at one end by the cross-piece and at the other by a girder. The two 4x4 timbers and cross-piece, put together as designed, called in the testimony a horse, were, in use, not braced at all nor fastened to the floor nor building. There was nothing to prevent the horse, so called, from collapsing under the strain of the ladder when weighted down by plaintiff being thereon some ten feet above the platform and at such an angle as to naturally push out from the foot. That happened,—resulting in plaintiff being so injured as to, practically, permanently destroy his earning power. He was thirty-six years of age.

The case was submitted to the jury in five questions. Answers were made to this effect: The scaffold was not so placed and operated as to give proper protection to the life and limbs of the person required to depend thereon for personal safety. The insecure condition was the proximate cause of the injury. Plaintiff was not guilty of want of ordinary care, contributing thereto. It will require $15,000 to fairly compensate him for damages sustained.

The court answered the first question. Many propositions were saved for consideration on appeal. Upon motion challenging the verdict as excessive, the court so held, though that it was not characterized by passion or prejudice. Upon the

ground that the verdict expressed the honest judgment of the jury, but was so excessive as to be clearly contrary to the evidence, a new trial was ordered, contingent upon plaintiff not electing to take judgment for $4,000 less than the jury award. Such election was made and judgment rendered accordingly.

For the appellant there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

W. B. Rubin, for the respondent.

MARSHALL, J. All of the many questions presented for consideration, except a few, may well be passed as involving errors, if errors at all, which were not fatally prejudicial, since it does not satisfactorily appear that, had they not occurred, the result might, probably, have been more favorable to the party complaining. That is the rule of the written law. Very likely such was the purpose of sec. 2829 of the Statutes though, it must be admitted, that until the legislative will was again unmistakably expressed by ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), some fifty years after its being first proclaimed, it was not, with perfect consistency, recognized here as going to the extent which now seems plain. As said in *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, whether the later statute adds to the earlier one, it is welcomed here as a help in shaping our jurisprudence on lines which our judgment approves,—lines in respect to which, though there was, formerly, some differences as to their having been laid in the written law, such differences did not spring from any hostility to what is now regarded as beneficial.

There may be want of harmony as to what is the legislative will incorporated in a statute, yet none as to whether that will should be given its intended vitality. The former may proceed from variant angles of judicial vision or any one of several other legitimate circumstances. It is now, by the

late most emphatic expression giving direction to judicial thought, made plain that the final termination of litigation must not be delayed by errors of trial courts, however numerous and inexcusable, unless it shall appear with reasonable certainty, that, had they not occurred, the result might, probably, have been more favorable to the one complaining of them.

In no other way than the one suggested can sec. 2829, Stats. (1898), supplemented by ch. 192, Laws of 1909, in letter and spirit, be given proper place in our judicial system. There is a presumption in every case, till evidenciarily overcome from an examination of the whole proceedings, not only against error, but, in case of error, against its being prejudicial,—that is, its affecting any substantial right of the party complaining. To overcome such presumption there must be affirmatively,—that is evidenciarily,—a reasonably clear appearance from the record that the error, not only harmed such party, in that it might have probably changed the result; but, harmed him in a material degree.

A full appreciation of the obstacle to error being a ground for relief here will prevent many appeals which can only work harm to the one seeking relief as well as his adversary by delay and wasteful expenditure: and, also, work harm to the public at large, which at great expense maintains the instrumentalities for settling controversies of sufficient moment to be worthy of judicial cognizance. Such appreciation will likewise cause counsel in presenting appeals to concentrate their energies on such points as are really worthy of attention, omitting the multitude of matters commonly presented for consideration.

The foregoing will explain why several questions in this case are not treated at all, and others only briefly, leaving, really, but three requiring more than mere mention, if even that.

Should the judgment have been for appellant because of

evidence conclusively establishing contributory negligence and assumption of the risk? That, first challenges attention in the order of the three major contentions made by appellant's counsel.

It is conceded that the contrivance in question was not reasonably safe. If the statute, hereafter referred to, applies, appellant must be held chargeable with having erected it. The mere manner of the use cannot be separated from that of the construction. The former was in contemplation of the latter. The platform was placed about twenty feet above the floor. A ladder, standing thereon and leaning, at or near the top, against some support, was a necessary part, since without it the workman could not efficiently reach the ceiling. So the character of construction must, necessarily, be considered with reference to that of use which was contemplated. The particular manner was found against defendant, in practical effect, in the finding as to proximate cause, if it does not appear conclusively from the evidence. So, in determining whether respondent assumed the risk or was guilty of contributory negligence, we must view the structure,—scaffold so called,—and ladder in combination, as used.

It being conceded, as indicated, and, as the fact is, that the platform was not properly constructed, was the imperfection so obvious that respondent, as an ordinary intelligent man, must be held to have known of it? He put it up; but, in doing so, acted for a superior; so the erection, to all intents and purposes, was by appellant. The whole contrivance was, in legal effect, supplied, the same as if the work were that of some person other than respondent. That is upon the theory, which the jury had a right to adopt, that respondent told the truth as to the platform having been put up and used as directed and observed by the chief engineer prior to the accident. In view of these facts, whether the imperfection in the contrivance should not have been known to respondent, is by no means entirely clear. Solved from an original stand-

point, the inclination might be in favor of appellant. The trial judge who was in closer touch with the matter than we are here, held that there was room in the evidence for reasonably conflicting inferences. If so, there was a jury question and the result cannot be disturbed whatever might be our decision, independently of the verdict. If there be error, the mischief is in the submission to the jury. They could not be expected to overrule the opinion of the trial judge by finding for appellant upon the ground that, as matter of law, there was contributory fault or assumption of risk as claimed. Jurors weigh probabilities against probabilities. Where the reasonable inferences are all one way the trial court must decide. If not before the case crosses the jury threshold, then after they have spoken. To wait for such speaking and then change the result, is to ask the jury to agree with the court and then disagree with their compliance therewith.

So the verdict, really, adds little, if anything, to the weight of the decision submitting the question under discussion as involving a conflict of reasonable probabilities. Such a decision must prevail here unless manifestly wrong. Reasonable doubts in respect thereto must be resolved in favor of the trial jurisdiction. Only in that way can the dignity be given thereto required by the written law, and which best promotes, in general, the speedy, economical vindication of right over wrong.

The proper construction of a scaffold or platform, in such a situation as that in question, may, reasonably, be said to involve more than ordinary experience. That respondent possessed such does not conclusively appear. Since expert knowledge, in some degree, may, reasonably, be said to have been required, appellant, regardless of the statute, was bound to supply it. That is, in any event, a master who is bound to supply a reasonably safe appliance for use of his servants—in case of the instrumentality involving the exercise of expert knowledge—and constructs it himself, he should do it with

such care and skill as is, in general, devoted to such matters by an ordinarily good expert.

Now assuming, as we must, that there was room in the evidence to hold, as matter of fact, that respondent did not possess the special knowledge requisite to charge him with information of the defects in the structure, and that it was as contemplated by appellant,—then there was a jury question in respect thereto as the trial court held. The element is quite significant, as the trial court doubtless thought, that the chief engineer had superior knowledge, as respondent had a right to believe, and he not only directed the manner of creating the contrivance, but saw the manner of its use, with approval by silence, and gave respondent assurance that it was perfectly safe.

So, though we confess again, the question of whether respondent was guilty of fatal fault in respect to the matter, is not free from difficulty,—that counsel had good warrant for raising and pressing that point with confidence upon our attention and for giving it significance on the appeal second only to the next question to be considered,—it does not seem sufficiently clear that the trial court was wrong to warrant overruling its decision.

Whether appellant, under common-law rules, was, clearly, actionably negligent, admits of some question. The trial court submitted the case solely upon the ground of breach of sec. 1636—81, Stats. (sec. 1, ch. 257, Laws of 1901). So, independently thereof, the verdict does not support the judgment. No presumption favorable to respondent can be indulged in as to findings having been made, on matters omitted which were essential, from a common-law standpoint, since liability was grounded on the statute and the court expressly refused to submit such omitted matters. Therefore, if the statute does not rule, the judgment must be reversed.

The statute is as follows:

"A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of

a house, building or structure shall not furnish or erect or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of the person so employed or engaged. . . ."

Note that the duty of the employer is made positive and emphatic. The language is somewhat unlike that treated in *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992; *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853; *McGinnis v. Northern P. Mills,* 147 Wis. 185, 132 N. W. 897, 133 N. W. 22, followed by ch. 396, Laws of 1911, changing the statute. Moreover, such statute as was thought, had theretofore received construction in a long line of cases. So it was viewed from a different angle than perhaps it would be now. It seemed best to adhere to the view supposed to have been previously taken as to the legislative purpose, especially, since there had been many unimproved opportunities for the lawmakers to again speak on the subject,—strongly suggesting that their will had been correctly understood by the court. It is probable that the true intent of sec. 1636*j*, Stats. (1898), was declared here, and, in the progress of events, that the more advanced thought was adopted which is now incorporated into sec. 1636*jj*, Stats. (Laws of 1911, ch. 396).

We must often read statutes, which are susceptible of a double meaning, in the light of the environment characterizing their enactment, in order to determine the precise legislative intent; the judicial duty and purpose being always to give effect thereto within constitutional limitations. So in a doubtful law, enacted at one time, the court may discover a particular purpose as the one intended, and in such an enactment at a much later day to meet an entirely different condition and respond to a different public sentiment, a different purpose may seem to have been intended.

So, if for no other reasons than those given, the restrictive meaning given in the cases cited to sec. 1636*j* of the Statutes

and similar laws does not have any great weight as to that of the one in question. It was adopted from the state of New York. It originated there by ch. 415, Laws of 1897 of that state. It was construed there in 1900, *Stewart v. Ferguson*, 164 N. Y. 553, 58 N. E. 662. The peculiar language thereof differing, somewhat, from anything in our sec. 1636*j* or sec. 1636*jj*, prior to 1911, was taken as placing upon the master a positive prohibition "without exception on account of his ignorance or the carelessness of his servants." After such construction the law was adopted here and, by a well known rule, it must be presumed that the legislature intended to adopt the construction also. So far, perhaps, as was necessary, this court followed it in *Fonder v. General C. Co.* 146 Wis. 1, 130 N. W. 884, but, without referring thereto or that the statute was of foreign origin. The first New York holding has rather been emphasized and broadened in favor of employees than otherwise, *Schapp v. Bloomer*, 181 N. Y. 125, 73 N. E. 563; *Smith v. Variety I. & S. W. Co.* 147 App. Div. 242, 131 N. Y. Supp. 1033; *Gombert v. McKay*, 201 N. Y. 27, 94 N. E. 186; *Caddy v. Interborough R. T. Co.* 195 N. Y. 415, 88 N. E. 747; *Rotondo v. Smyth*, 92 App. Div. 153, 86 N. Y. Supp. 1103, followed as binding on the federal supreme court as to a cause of action arising in New York. *Hutton v. Holdrook, C. & D. C. Co.* 139 Fed. 734. The language of the late New York cases seems to have been used with a much clearer appreciation than formerly of the broad liberal purpose toward employees which the legislature had in mind, as witness the following from *Gombert v. McKay, supra*, decided in 1911:

"It, in terms, absolutely forbids those employers to furnish or operate, or cause to be furnished or operated, any apparatus therein mentioned of the character and quality described by it. It, in its effect, provides that any employer who either personally, or by another, furnishes for the performance of any named labor a forbidden article shall be responsible therefor. The duty of the employer created by it

is personal, incapable of delegation, and unaffected by caution and discrimination in selecting employees for their prudence and competency."

Also the following from *Smith v. Variety I. & S. W. Co., supra,* decided in 1911:

"The defendant is not held liable for injuries to its workmen occasioned without any fault upon its part. It was at fault in furnishing a scaffold which was not safe, as the statute required it to do. While the scaffold appeared to be safe it was, in fact, insecure. Under the law the employer became responsible for the safety of the scaffold when he directed the workmen to use the scaffold."

So it must be held that the legislature intended to make employers, in the situations dealt with by the statute, absolute insurers of the safety of their employees, save in cases of efficient assumption of the risk or contributory negligence. The legislature is presumed, as was held in New York, not to have intended to abolish those defenses though it had power to do so. *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 94 N. E. 431. That result was reached by construction under the old rule that the legislature will not be held to have intended to abrogate the common law where the contrary does not appear, expressly, or by very clear inference. It has, commonly, been said, an act in derogation of the common law is to be read most strictly in favor of the latter. That is not without its exceptions, as we shall see later. In general, like most other judicial rules, where the reason for it manifestly does not exist the rule does not apply.

Thus, it seems plain, the case made by the evidence is within the statute as to fault of respondent, if the structure and the work to which it was devoted were within it.

The statute, in the respects suggested, is open to construction. The field had not been covered prior to its adoption here, nor has it been since in any very satisfactory way. As

regards a rule, evolved from a general exposition of the statute, defining its limitations as definitely as practicable so as to minimize difficulty of determining whether any given case falls within it, the subject is quite open to original treatment.

It must be conceded that the full reasonable scope of the words of the law, on the side most favorable to employees, includes the general restoration of a structure, or any substantial part of it, to a proper condition, in any material particular, as for painting, and on the side most favorable to employers it stops quite short of that. In the broad liberal view, any act of restoration to a former, more perfect condition, is repairing. The only restriction heretofore made here is that it does not apply to rebuilding an entire structure. *Blount v. Janesville,* 31 Wis. 648. The New York court, Appellate Division, *Stokes v. New York L. Ins. Co.* 112 App. Div. 77, 98 N. Y. Supp. 135, inferentially, at least, held that common ordinary washing is not within "repairing," which might well be, and, cleaning, out of the ordinary, requiring the use of staging or scaffolds and ladders, especially preparatory to more important work, such as painting, with or without other design than to restore to a good or suitable condition, might be. The latter seems to be within the reasonable scope of the statute, and, perhaps, it might be given a narrower meaning in favor of employers. A reference to authorities would do little good. They would only show how the word has been construed under particular situations, none being sufficiently analogous to that in hand to be helpful. In general, they refer to the meaning commonly found in standard dictionaries,—"to restore to a good state after decay, injury, dilapidation, or destruction,"—that is to make good again an existing thing which for some reason has fallen from a former condition of suitableness,—and then determine between those broad comprehensive lines the intent of the legislature in the particular instance.

Much that has been said respecting "repairing" applies to

"scaffolding" and "mechanical contrivance." The scope thereof would reasonably include any temporary structure made up of parts, viewing the term in its broadest scope, used for support while doing any kind of work mentioned in the law,—any kind of an elevated platform for workmen to use in the performance of their duties. Any combination for use in doing any kind of work mentioned in the statute where the servant is dependable thereon for support, in place of an ordinary surface, such as the ground or floor, is a mechanical contrivance. The legislature, in the combination of words, "scaffolding, hoists, stays, ladders or other mechanical contrivance," viewed in a broad remedial sense in favor of employees, left little, if anything, uncovered which may be used in the work mentioned, where required to be done beyond the reach of one standing on an ordinary surface.

So we face three questions, viz.:

1st. Shall we merely determine whether the particular facts here made a case within the statute, without reaching the result by a logical process of reasoning which will so clear up obscurities as to minimize, so far as practicable, uncertainties, as to what situations, in general, the statute applies to and what it does not,—just taking a step which may, in the course of time, by exclusion and inclusion, render the law reasonably easy of application, or make, now, a decision as narrow as the case?

2d. Should the statute be strictly construed, minimizing, so far as the language used will permit, its departure from the common law, as has been generally done in treating such changes of that which was adopted for this state by vote of the people in adopting the constitution?

3d. Should the law have a broad liberal construction, giving effect thereto within the boundaries of reason and the scope of the words used,—a construction giving it the amplest vitality, as a piece of remedial legislation to deal with personal injuries in the field mentioned in the act, so as to nar-

row, so far as can reasonably be done within such boundaries, the dangers of irremediable loss to employees without efficient fault on their part?

It is considered that the first question should be answered in the negative. The industry of the legislature in trying to remedy the neglect of the past to furnish employees reasonable immunity from danger of irreparable loss in case of being corporeally injured in service, evidenced by the several important acts which have recently been passed, the crowning one being the Workmen's Compensation Act, should not be so devitalized by the courts as by making for such acts as narrow a decision as practicable. True, that course, in general, is common and is the best; but, there are good exceptions and this seems to be one. The court should go, at least, far enough to make definite the viewpoint, in general, from which the scope of the law should be measured. That would be within the boundaries of the case. It would, doubtless, be in harmony with the wish of the legislature. It would be helpful to bench and bar in future cases. It would save much public and private waste. So we must decide between the rule of strict and of broad liberal construction, and let the choice determine the scope of the law.

The ordinary rule, in case of a radical departure from the common law, should not be displaced without some good reason for it. Is there such in this instance?

The basic idea of the common rule is that the legislative will should govern; the presumption being against intent to change the system adopted by a referendum to the source of power. It is no part of judicial administration to either extend or minimize the meaning of written law according to what may appear, in that field, the better policy. The legislature, within constitutional limitations, in the realm of public policy, is the supreme judge. So the strict construction which sometimes confines written law closely within its let-

ter,—even restricts that,—is applied as the way of most certainly bowing to the will of the lawmakers. That is often not fully appreciated. Such want of appreciation sometimes causes unjust criticism. If when the law in question originated there was clearly a purpose indicated by the general trend of legislation as to superseding the harsh common-law rules which afforded no remediable dignity, in many situations, to injuries received by employees in the course of their employment, then laws to that end should receive the broad liberal construction commonly applied to legislation designed to remedy a supposed mischief,—really that construction commonly applied to remedial legislation.

True, in a technical sense, such a law as the one here gives a new right instead of a new remedy, but in the broader sense,—in the one which forms the basis of legislative activity in such matters,—it recognizes as a right that which was before, through a harshness of system now regarded, quite widely, as unsuitable to modern conditions, thought to be unworthy of such dignity, and affords a remedy. So in a just and proper sense, such a law is remedial in character.

One of the most persuasive reasons, formerly, given for restricting the effect of legislation such as that in question, is that, in effect, it would make employers insurers of the safety of their employees, and that it is not to be presumed the legislature would, under any circumstances, cast such a burden upon them, and that the court should not read any such purpose out of legislative action in the face of any fair way of escape from it. From the viewpoint of later times it has come to be appreciated that such legislation does not, in reality,—in practical effect,—transfer the losses inflicted upon employees from them to their employers; but, merely, makes a more direct, humane, and economical transfer thereof to the products of labor as a natural inevitable part of the cost thereof; thus laying the burden on consumers of the same as

insurers where, by natural and moral obligations, it belongs,—a crystallization of economic law and moral duty into legal obligation.

The changed public policy and sentiment from the time when it was common, by construction, to practically, if not actually, violate the letter of written law to preserve old limitations upon rights and remedies, is no more significantly illustrated than in our Workmen's Compensation Act. Even the once thought magnitude of the burden of such legislation to employers has been greatly lessened by the modern facilities afforded them to insure against the risk. Such opportunities being open and readily enjoyable by employers, if they do not embrace them, the failure has a cast of negligence on their part, or voluntary assumption of risk.

Thus the ground for former supposition, as to unreasonableness, hence reason for restricting the scope of the legislation by construction in order to shape it to the will of the people, has been substantially removed by modern development. That illustrates the danger of adhering, strictly, to the adjudicated meaning of a legislative collection of words in the field of police legislation, when it depends upon construction, and of adhering, strictly, regardless of lapse of time, to what is reasonable and what, destructive legislation in such field. The absurd, oppressive, and illegitimate, viewed in the environment of one age, may be reasonable and legitimate,—even demandable by the moral standards of another through a mere change of conditions. So, in this case, the reasons for the strict construction of the legislation in favor of subsistence of the common law have been eliminated to such extent, that what still remains may be of little weight as compared with the importance of fully remedying the mischiefs the lawmaking power legislated against, and so, form no appreciable obstacle to giving greater effect than formerly, as to such legislation, to the words of the law which, in their letter, make employers the primary stepping stone of personal

injury losses by accidents to their servants to the consumers in general, which the legislature has by several recent expressions of its will shown a disposition to accomplish as fully and as fast as practicable.

In addition to the Workmen's Compensation Law there is ch. 254, Laws of 1907, and are several others of a significant character, showing decided change of public policy,—some following closely restrictive decisions of this court, required, as was thought, by a settled prior construction of legislation of a similar character, radically remedying such construction by new enactments,—notably ch. 396, Laws of 1911, wherein it is provided that the duty to guard against danger to employees created by sec. 1636*j* and sec. 1636*jj* "shall be absolute" and "the exercise of ordinary care on the part of the employer shall not be deemed a compliance with such duties," supplementing the latter section, practically abolishing the defense of assumption of the risk.

The circumstances mentioned and others which might be referred to,—notably the general trend of legislation throughout the land and strong public sentiment evidenced in many ways for the creation of a system which will reasonably protect employees from the dangers incident to their service; abrogating as far as practicable the evidence of "man's inhumanity to man," evinced in the old system, which, though of judicial creation and development, originally, became the law of our state, as before indicated, by referendum to the people in the adoption of that part of the constitution found in sec. 13, art. XIV, in the words:

"Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature,"—

unmistakably indicate, as it seems, that to apply the common rule of construction of legislative enactments in derogation of the common law to that in question, would go counter to the

legislative will. We may properly emphasize, in passing, that responsibility for objectionable features in the law of negligence does not, to any great extent, at least, lie at the door of the court. The remedy within the broad lines of constitutional limitations has been with the lawmaking power from the start. An awakening there was the thing required and, perhaps, it did not come too soon. Had it occurred sooner, there would, probably, have been far less complaint of that which was powerless to furnish a remedy. It could only, with courage requisite to full performance of duty, deal with the law as given and wait for the needed changes indicated by advanced human sentiment of the day and required by modern industrial conditions, stepping, justifiably, it is thought by the writer, from time to time, aside to stimulate activity where only that could be efficient.

Applying to the statute the broad liberal rule suggested, and appreciating the mischiefs it was intended to remedy, both the kind of work and contrivance in question are fairly within it. The plain purpose is inconsistent with such fine distinctions as that between a structure in a room and one outside of a building, or that between a platform six feet above a floor and one at a greater height, suggested in *Schapp v. Bloomer,* 181 N. Y. 125, 73 N. E. 563, and that between a place and an appliance, making a scaffold the latter and so not within the safe-place rule, as in *Butler v. Townsend,* 126 N. Y. 105, 26 N. E. 1017; *Kimmer v. Webber,* 151 N. Y. 417, 45 N. E. 860, the latter being said in *Caddy v. Interborough R. T. Co.* 195 N. Y. 415, 88 N. E. 747, to have been displaced by the law, which was adopted here, and the former practically rejected as out of harmony with the legislative purpose; that the rule of *ejusdem generis* does not apply to restrict the meaning of any of the descriptive words in the law.

So the word "repairing" stands by itself, in practical effect.

It is not to be restricted by anything which precedes it or follows it. The same is true of the term "scaffolding" and the words "mechanical contrivance." Each is to be given the broad comprehensive meaning necessary to accomplish the manifest purpose of the act. Both the work and the structure or contrivance may be as well inside a building as outside and the particular distance above the floor or ground is not material so long as the work and the contrivance answer fully to the calls of the law.

The result is that the trial court was right in holding that the case made by the evidence was clearly within the statute and submitting to the jury only the questions concerning the claimed fault of respondent and the damages.

Was there error in not requiring respondent to submit to a greater reduction of the jury award? That is the only remaining question, deemed of sufficient importance to require special attention.

Personally, I think the reduction should have been greater, but I am content with merely stating my position and the effect of the recovery in justification thereof, which I may properly do here, while confessing the logic of the prevailing view and endeavoring to support it, impersonally, with as much fidelity as if it were my own.

The respondent was a young man, only thirty-six years of age, of good health, and above the average in earning capacity, which was about $864 per year. The jury had a right to believe, from the evidence, that his earning power was practically destroyed. The details need not be stated. His capacity to move about and enjoy life is permanently greatly impaired. There was much pain and suffering, but that, as appears, will not continue to any great degree. The injury was to the limbs. There has been a recovery so that he will probably be able to permanently move about by the aid of a cane or other usual support in case of such defects. He will

probably be able to earn something, though not in his former vocation or in any manual labor requiring much exertion. He was paid, after the injury, as matter of favor, $567.56 as wages, and his expenses for hospital, ambulance, and doctor's services were assumed by appellant. It is presumed, since the contrary, in the judgment of the court, does not clearly appear, that the jury award was reduced in observance of the legal standard under the circumstances, viz.: to the lowest amount which in any reasonable probability, another jury of fair men, properly instructed, would find on the same evidence,—recognizing, efficiently, appellant's right to a jury trial in respect to the matter. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644; *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45. It affirmatively appears, also, that consideration was given to whether the verdict was too large, independently of any illegitimate influence, and that the jury were acquitted of having been actuated by passion or prejudice. The award was treated as their honest judgment, but unreasonably large, nevertheless. To cure that and at the same time, in practical effect, give appellant the benefit of a jury award, a reduction from $15,000 to $11,000 was thought necessary.

So, in the legal aspects, the course of the trial court to the result reached, is faultless. Manifestly, the judge had a far better opportunity of determining the matter than is possessed here; he not only having seen and heard the witnesses, but, particularly, had opportunity to observe respondent. In such circumstances it requires a very strong case of excessiveness to warrant disturbing the judgment. While the recovery seems quite large, it is not thought to involve such clear mistake of judgment as to satisfy the rule suggested. It is probably equal to a life annuity for respondent of about $600 per year. Or, as it is thought, around three fourths of his former earning power. That is to balance capacity to engage

in gainful occupations and other elements proper to be considered. It is in that view, that this court does not see its way clear to disturb the trial decision, though, as said before, the writer inclines to the opinion that the recovery should have been lessened considerably more.

By the Court.—The judgment is affirmed.

KERWIN, J. (*concurring*). The opinion of the court takes a broad range, and occupies a field, in my opinion, far beyond that necessary to the decision of the case. I concur in the conclusion reached that the judgment should be affirmed, but do not subscribe to all that is said in the opinion.

TIMLIN, J. I concur in the result in this case, but there are many things said in the opinion not necessary, I think, to the decision of the case, which appear to me rather startling and to which I am not prepared to assent. I never believed that "in a doubtful law enacted at one time the court may discover a particular purpose as the one intended, and in such an enactment at a much later date to meet an entirely different condition and respond to a different public sentiment a different purpose may seem to have been intended." Industrial, economic, or social conditions existing at the time of the passage of a law may affect its construction and meaning, but public sentiment may not do so. Nor can I assent to the saying that the legislature intended to make employers in the situations dealt with by this statute absolute insurers of the safety of their employees save in cases of assumption of risk or contributory negligence; nor that the statute law should be construed, explained, and declared by the court in advance of cases presenting such questions for adjudication. Neither do I approve of this swing from one extreme to the opposite. Nor can I agree with reference to the statute in question that "the field has not been covered prior to its adoption here nor

has it been since in any very satisfactory way." *Fonder v. General C. Co.* 146 Wis. 1, 130 N. W. 884, was quite satisfactory to me although it did not attempt to "cover the field." That was one reason why it was satisfactory.

BARNES, J. (*concurring*). I concur in the result. I do not indorse all that is said by way of discussion in the opinion.

MAERCKER, Plaintiff in error, vs. CITY OF MILWAUKEE, Defendant in error.

November 19—December 10, 1912.

Municipal corporations: Ordinances: Validity: Classification: Rendering of animal matter: Discrimination: Reasonableness of ordinance: Court or jury.

1. In the enactment of municipal ordinances, as well as of statutes, reasonable classification is permissible, subject to constitutional limitations; and only where the bounds of legislative discretion are clearly exceeded will the court deny validity to the legislation. The general rules governing proper classification are the same in both cases.
2. There is reasonable ground for discrimination between the business of rendering offal and shop fats collected from butcher shops and that of rendering fresh material from animals slaughtered on the premises where rendered, and an ordinance prohibiting the former within certain limits, while permitting the latter, is valid.
3. Where municipal legislative action proceeds from authority expressly granted, and the facts are undisputed, the question whether a city council has exceeded its power by enacting an unreasonable ordinance is purely judicial, to be considered substantially the same as the question whether the legislature has in a given case exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power.

ERROR to review a judgment of the municipal court of Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is a writ of error to the municipal court of Milwaukee county to review a judgment of that court. The plaintiff in error was found guilty of violating sec. 1 of an ordinance of the city of *Milwaukee* and sentenced to pay a penalty of $25 and costs. The ordinance prohibits the rendering of any animal or animal matter within the limits of the city of *Milwaukee* and within a distance of four miles therefrom, "except where the product when rendered is to be used for human food, and excepting the fresh material from animals, slaughtered on the premises where rendered." The ordinance also provides that the Milwaukee, Menomonee, and Kinnickinnic rivers with their branches, to the outer limits of the county of Milwaukee, and all canals connected with said rivers, together with the lands adjacent to said rivers and canals, or within 100 rods thereof, shall be deemed to be within the jurisdiction of the city.

Sec. 2 of this ordinance provides a penalty by fine of not less than $25 nor more than $200 for each offense, and that each and every day upon which any such rendering shall be done shall be a separate offense.

A demurrer was interposed to the amended complaint and overruled, and defendant pleaded not guilty. Objection was made to any evidence under the complaint upon the ground that it does not show on its face that defendant violated any ordinance of the city of *Milwaukee,* and that the common council had no power to pass the ordinance. At the close of the evidence counsel for plaintiff in error moved for discharge on several grounds, which motion was denied. The following verdict was rendered:

"(1) Did the defendant on August 12, 1911, at his place of business on Vogel's Island, on Canal street, in the city of *Milwaukee,* render about 10,000 pounds of animal matter known as meat-market scraps or offal, collected from meat markets within the city of *Milwaukee,* not to be used for human food, and not from animals killed on the premises? *A.* Yes.

"(2) Do you find the defendant, *Otto Maercker,* guilty or not guilty of a violation of the ordinance on August 12, 1911, as charged in the complaint? *A.* Guilty.

"(3) Did the business of rendering the class, amount, and condition of material such as rendered by the defendant on the 12th day of August, 1911, within the limits of the city of *Milwaukee,* on Vogel's Island, and upon a slip or branch of the Menomonee river opening into said river, create a public nuisance? *A.* No.

"(4) Was there, with relation to the public health, comfort and welfare of the citizens of *Milwaukee,* a material difference in fact between the rendering of a like amount of fresh material taken from animals slaughtered on the premises where rendered, and the rendering of a like amount of such material as was rendered by the defendant known as meat-market scraps or offal, on the 12th day of August, 1911? *A.* No.

"(5) Did the rendering of the class and condition of material such as was rendered by the defendant on August 12, 1911, materially interfere with the public health, comfort and convenience of the citizens of *Milwaukee?* *A.* No."

For the plaintiff in error there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *E. T. Fairchild* and *F. T. Boesel.*

For the defendant in error there was a brief by *Daniel W. Hoan,* city attorney, and *E. L. McIntyre,* special assistant city attorney, and oral argument by *Mr. McIntyre.*

KERWIN, J. The plaintiff in error, hereinafter called the defendant, was convicted below of violating an ordinance of the city of *Milwaukee* and brings the judgment here for review by writ of error.

The conviction was under an ordinance prohibiting the rendering of any animal or animal matter within the limits of the city of *Milwaukee* and within four miles therefrom, subject to certain exceptions. The main contention of the defendant is that the ordinance on which the proceedings are

based is invalid because it creates an unjust, unreasonable classification and is discriminatory.

Under this head counsel for defendant cites us to the following authorities: *State ex rel. Garrabad v. Dering,* 84 Wis. 585, 54 N. W. 1104; *Crowley v. West,* 52 La. Ann. 526, 27 South. 53, 47 L. R. A. 652; *People ex rel. Duryea v. Wilber,* 198 N. Y. 1, 90 N. E. 1140; *Bear v. Cedar Rapids,* 147 Iowa, 341, 126 N. W. 324; *New Hampshire v. Pennoyer,* 65 N. H. 113, 18 Atl. 878, 5 L. R. A. 709; *Fulton v. Norteman,* 60 W. Va. 562, 55 S. E. 658, 9 L. R. A. N. S. 1196; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Simrall v. Covington,* 16 Ky. Law Rep. 770, 29 S. W. 880, 9 L. R. A. 556; *Kosciusko v. Slomberg,* 68 Miss. 469, 9 South. 297, 12 L. R. A. 528; *Hudson v. Thorne,* 7 Paige, 261; *State v. Miksicek,* 225 Mo. 561, 125 S. W. 507; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277. An examination of the foregoing cases cited by counsel for defendant will show that they turn mainly upon the question of classification, and some involve the questions of reasonableness, conflict with charter provisions, statutes, and general principles of the common law, and constitutions, state and federal.

An examination of the ordinance under consideration will show that the question here is one of classification only. If the classification can be sustained the ordinance is valid. The part of the ordinance attacked as void is as follows:

"Sec. 1. The rendering of any animal or animal matter, except where the product when rendered is to be used for human food, and excepting the fresh material from animals slaughtered on the premises where rendered, is hereby prohibited within the limits of the city of *Milwaukee* and within a distance of four miles therefrom. . . ."

There is no question about the authority of the common council of the city of *Milwaukee* to regulate the subject under consideration. Express authority is conferred by the legislature. Sec. 3, ch. IV, Milwaukee Charter, 1905. After

the general enumeration of powers of the common council, subd. 7, sec. 3, ch. IV, provides:

"To direct the location and management of, and regulate breweries, tanneries, packing houses, livery stables, and sale stables; and to direct the location, management and construction of, and regulate, license, restrain, abate or prohibit within the city and the distance of four miles therefrom, distilleries, slaughtering establishments, establishments for steaming or rendering lard, tallow, offal, and such other substances as can or may be rendered, soap factories, and all establishments or places where any nauseous, offensive or unwholesome business may be carried on; provided, that for the purpose of this section the Milwaukee, Menomonee and Kinnickinnic rivers, with their branches, to the outer limits of the county of Milwaukee, and all canals connected with said rivers, together with the lands adjacent to said rivers and canals, or within one hundred rods thereof, shall be deemed to be within the jurisdiction of the city."

It will be seen from the foregoing provisions of the charter that express authority is delegated to the city to "license, restrain, abate or prohibit within the city, . . . slaughtering establishments, establishments for steaming or rendering lard, tallow, offal, and such other substances as can or may be rendered. . . ."

The city having express authority to pass an ordinance regulating or prohibiting rendering within the city, the question arises whether the classification is valid. It is well established by the decisions of this court that the policy of classification, subject to constitutional limitations, is within legislative discretion. *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277; *State v. Evans,* 130 Wis. 381, 110 N. W. 241; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561. In *Servonitz v. State, supra,* the court said at page 239:

"In considering the subject we must bear in mind that the policy of classification is a matter wholly within legislative discretion, and that whether there is room for the classification made in any given case is primarily a legislative question and can never become a judicial one except for the purpose

of determining, in any given situation, whether legislative action passed the boundaries of reason, reasonable doubts to be resolved in the negative."

Legislative authority having been delegated to the city to deal with the subject within the field of regulation, the question arises whether it exceeded legislative bounds as regards classification. In *Bartlett v. Eau Claire Co.* 112 Wis. 237 (88 N. W. 61), at page 247 this court said:

"Nevertheless, the very fact of delegation of legislative power to regulate carries an implication that there is a considerable field for legislative discretion within which the depository is not subject to judicial review. Only when the just bounds of that field are clearly exceeded will courts deny validity to the legislation."

See, also, on this point, *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *La Pointe v. O'Malley,* 47 Wis. 332, 2 N. W. 332; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

The general rule governing proper classification has often been laid down by this court. The classification must be germane to the purpose of the law. It must not be based upon existing circumstances only, or so constituted as to preclude additions to the number included within a class, and the law must apply equally to each member of the class, and all classification must be based upon substantial distinctions which make one class different from another. *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; *State ex rel. Busacker v. Groth,* 132 Wis. 283, 112 N. W. 431; *State v. Evans,* 130 Wis. 381, 110 N. W. 241; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071. We think the classification in the instant case is valid, and not out of harmony with the decisions of this court upon the subject.

The question on classification is whether there is reasonable ground for discriminating between the business of render-

ing offal and shop fats, material collected from butcher shops, and fresh material from animals slaughtered on the premises where rendered. Now it seems clear that there is a substantial distinction, clearly marked, between rendering fresh material from animals slaughtered on the premises where rendered, and rendering offal and shop fats collected from butcher shops, when we apply the reason of the prohibition. A general rendering business from such offal and shop fats as are collected throughout the city might be very offensive to citizens if not restrained, while rendering fresh material on the premises where the animals are slaughtered might not be. There is an apparent natural reason for the classification. As said in *Nichols v. Walter,* 37 Minn. 264, 33 N. W. 800:

"The true practical limitation of the legislative power to classify is that the classification shall be based upon some apparent natural reason,—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them."

State v. Whitcom, 122 Wis. 110, 99 N. W. 468; *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561.

The ordinance applies to every rendering plant in the city coming within the class and cannot be regarded as an unlawful discrimination. *Milwaukee v. Gross,* 21 Wis. 241. See, also, *Slaughter-House Cases,* 16 Wall. 36; *Clark v. Titusville,* 184 U. S. 329, 22 Sup. Ct. 382; *Morrill v. State,* 38 Wis. 428; *State ex rel. Henshall v. Ludington,* 33 Wis. 107. The defendant here complains of the burden cast upon him by the ordinance, and it is probably true that it does not rest lightly. But as said in *State ex rel. Kellogg v. Currens,* 111 Wis. 431 (87 N. W. 561), at page 440, "No classification is perfect. No general line can be drawn that will not present glaring cases of inequality and inconsistency."

Counsel for defendant cites but two cases from this court

to sustain his position that the classification in the case at bar is invalid. *State ex rel. Garrabad v. Dering,* 84 Wis. 585, 54 N. W. 1104, and *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468. In the first case the classification was manifestly unauthorized under the rules repeatedly laid down by this court, and, moreover, unwarranted power to determine the classification was under the ordinance vested in the mayor. By the ordinance it was provided that it should be unlawful for any person, society, or association, etc., to march or parade upon certain streets shouting, singing, etc., without first having obtained permission from the mayor of the city, and that the provisions of the ordinance referred to should not apply to funerals, fire companies, regularly organized companies of the state militia, or political parties having a regular state organization. It needs no argument to show that such an ordinance is void. In *State v. Whitcom* it was held that there was no legitimate classification germane to the purpose of the law. The law was a peddler's law, requiring payment by some for a license to peddle and exempting others. The classification was not classification at all, based upon any legitimate rule. It was merely arbitrary selection. So the *Whitcom Case* has no bearing here.

We do not regard it necessary to go outside of this state for authority upon the subject of classification. This court has so fully and repeatedly discussed the matter in all its phases that authority from foreign jurisdictions can add little to the adjudications here.

It is further contended that the reasonableness of the ordinance was a question of fact for the jury. This question is properly raised on the record and error assigned thereon. Counsel relies mainly upon *Clason v. Milwaukee,* 30 Wis. 316; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *Hayes v. Appleton,* 24 Wis. 542; *Barling v. West,* 29 Wis. 307; 2 McQuillin, Mun. Corp. 1584.

There is authority for the position of counsel for defendant as shown by the above cases. But the rule is of limited ap-

plication and the decisions conflicting. 2 McQuillin, above cited, pages 1583 and 1584, says:

"The doctrine is uniformly supported that the question whether an ordinance is reasonable is one of law for the court. This is the rule, declares the supreme court of Minnesota, both when the invalidity of the ordinance is apparent on its face and where the invalidity is made to appear from extrinsic facts.

"A few Wisconsin cases have held that, under particular circumstances, as where the question of reasonableness depended upon the existence of certain facts concerning which the court possessed no judicial knowledge, it is entirely proper to look into the facts and submit the question of reasonableness to the jury. And in a Texas case the law on the subject was stated to be that, where the facts which may render an ordinance reasonable or unreasonable are controverted, they should be submitted to the jury to pass upon. So a North Carolina decision expresses the view that 'the reasonableness of an ordinance is for the court, the jury only being called in to find the facts, when in dispute.'"

Several cases are cited by the author in support of the propositions laid down in the text.

We think this court has correctly stated the rule in a case much later than those above cited, *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331 (85 N. W. 1036), at page 351, where the court said:

"Whether, in any given case where the facts are undisputed, a city council has exceeded its power by the enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially the same as that of whether the legislature has exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power."

See, also, *Bartlett v. Eau Claire Co.* 112 Wis. 237, 88 N. W. 61.

Even in *Clason v. Milwaukee,* 30 Wis. 316, it is held that ordinarily the question of reasonableness is for the court.

Where municipal legislative action proceeds from authority

expressly granted, "the rule seems to be universally that which applies to the action of all legislative bodies." 2 Abbott, Mun. Corp. p. 1358; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209; McQuillin, Mun. Ord. § 181; *Block v. Chicago,* 239 Ill. 251, 260, 87 N. E. 1011; *Peoria v. Calhoun,* 29 Ill. 317; *Shea v. Muncie,* 148 Ind. 14, 46 N. E. 148.

In the case at bar it is clear from the authorities that the reasonableness of the ordinance was for the court. The ordinance being valid, the findings of the jury, 3, 4, and 5, were immaterial. *Taylor v. State,* 35 Wis. 298. We find no error in the record and think the judgment is right and should be affirmed.

By the Court.—Judgment affirmed.

GAUF, Respondent, vs. MILWAUKEE ATHLETIC CLUB, Appellant.

November 20—December 10, 1912.

Master and servant: Wrongful discharge: Measure of damages: Mitigation: Pleading: Evidence.

1. Where one hired for a given term is wrongfully discharged his right to recover is limited to his actual loss, which is *prima facie* the stipulated wages which he was prevented from earning; but he is bound to use reasonable efforts to secure other employment, and the damages are to be reduced by what he earned, or by the exercise of reasonable diligence might have earned, during the period.
2. Such mitigation of damages, to be available to defendant, must be pleaded. It is not enough to plead merely that plaintiff did not make any effort to obtain work after his discharge, but it must also be alleged that he might have obtained work by the exercise of reasonable diligence, unless the circumstances are such that the latter fact must be presumed.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover for breach of contract to employ plaintiff at stipulated compensation per month. The alleged period of employment was during June, 1910, and the compensation $155. It was claimed that plaintiff was discharged without cause on the 6th day of the month and so was prevented from earning the agreed compensation for the rest of the month. Defendant claimed that plaintiff was employed, subject to be discharged at pleasure, and that he was discharged accordingly. On the evidence and verdict plaintiff was entitled to the amount for which judgment was rendered.

For the appellant there was a brief by *Carroll & Carroll,* and oral argument by *G. J. Carroll.*

F. H. Gugel, for the respondent, cited, among other cases, *Babcock v. Appleton Mfg. Co.* 93 Wis. 124, 127, 67 N. W. 33; *Winkler v. Racine W. & C. Co.* 99 Wis. 184, 187, 188, 74 N. W. 793; *Barker v. Knickerbocker L. Ins. Co.* 24 Wis. 630, 638; *Van Winkle v. Satterfield,* 58 Ark. 617, 25 S. W. 1113, 23 L. R. A. 853, 855.

MARSHALL, J. Appellant was not permitted to introduce evidence of its having kept a tender good which was made after commencement of the action. That was not prejudicial in any event, because the result of the trial shows that the tender was insufficient.

Appellant was not permitted to prove that respondent did not make any effort to obtain work after he was discharged, nor permitted, on the trial, to amend the answer alleging such failure of effort. The rejection of evidence was correct because it related to mitigation of damages and no basis was laid in the answer therefor. The refusal of leave to amend was proper because the proposed amendment did not go far enough to be material.

Prima facie, in such a case as this, the measure of damages is a sum equal to the stipulated wages for the period the employee was prevented from earning in consequence of the

discharge; but, that is subject to mitigation by the amount the employee earned, or might by the exercise of reasonable diligence have earned, during such period. As usual, the mitigating circumstance, to be available, must be pleaded. Moreover, it is not sufficient to plead merely neglect to seek for employment, unless the circumstances are such that it must be presumed that employment was obtainable by exercise of reasonable diligence. The law in respect to the matter is very familiar,—in fact about as well known as anything of a purely elementary nature. This court has often dealt with the subject. *Danley v. Williams,* 16 Wis. 581; *Barker v. Knickerbocker L. Ins. Co.* 24 Wis. 630; *Winkler v. Racine W. & C. Co.* 99 Wis. 184, 74 N. W. 793.

The duty of the discharged employee, in the circumstances of this case, is not very definitely stated in the cases cited. Doubtless it was thought to be too familiar to require anything more than a general reference to the subject. That might not efficiently challenge attention to the precise rule in case of the reader not being grounded in the principles. In general, the same rule applies as in other cases of breach of contract, viz.: "The damages are such as may fairly and reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it," and it is the duty of the damnified party to use reasonable care to prevent unnecessary loss. In *Barker v. Knickerbocker L. Ins. Co., supra,* the trial court was asked to instruct the jury to the effect that voluntary idleness is regarded as a breach of duty, and if a party remains idle for the purpose of charging another, the law regards his act as a fraud upon such other person. And, therefore, if the plaintiff was wrongfully discharged by the defendant before his time had expired it was his duty to have sought employment elsewhere. The refusal to so instruct was held not error, because there was no evidence tending to show that there was employment within reasonable reach of the plaint-

iff; that defendant, in such case, must show that fact and not rest upon the mere claim that plaintiff made no effort to obtain employment.

While we approve of the trial court's ruling here, we must disapprove, most emphatically, of the reason which it gave therefor, viz.: that a discharged employee need not make any effort to obtain employment; that he may remain in voluntary idleness and efficiently claim full damages unless he rejected some offered employment. That has no support which we are aware of. It is contrary to principle and authority. In Wood's Law of Master and Servant (2d ed.) page 245, the subject is treated, as commonly, thus:

The discharged employee "is bound to use reasonable efforts to secure labor elsewhere. He cannot sit down supinely, and with folded hands, insist upon the payment of his wages, but must seek employment elsewhere, or at least use reasonable efforts to secure it." His right to recover of the employer "is limited to the actual loss," "which is the amount he would have received if he had been permitted to complete his contract, *less what he has earned in the meantime, or what he might have earned by due diligence in seeking employment.*"

In Sutherland on Damages (3d ed.) sec. 88, the rule is put this way:

"If a person hired for service for a given term is wrongfully dismissed he is entitled to the stipulated wages for the term of his engagement if that is his loss. It is *prima facie* his loss; but the law imposes upon him the duty to seek other employment; and to the extent that he obtains it and earns wages, or might have done so, his damages will be reduced."

By the Court.—The judgment is affirmed.

KATZ and another, Appellants, vs. DE WOLF and others, Respondents.

November 20—December 10, 1912.

Corporations: Control by courts: Deadlock in affairs: Receivers: Appointment pendente lite: *Appeal: Discretionary order: Error as to existence of power.*

1. The power of the circuit court to appoint a receiver for a corporation exists under its general equity jurisdiction, and is not limited to cases coming within the express provisions of the statutes.
2. The rule that where a court refuses to exercise a discretionary power on the erroneous assumption that the power does not exist the order appealed from should be reversed, has no application to cases in which there is no sufficient ground shown for the exercise of the court's discretion, nor to cases in which the court decided that, even if it had the power, it would in the exercise of its discretion deny the motion.
3. The mere fact that a deadlock exists between contending groups of stockholders and that charges of misconduct are made against the group in control, does not authorize a court of equity, upon affidavits and in advance of a trial upon the merits, to appoint a receiver for a solvent corporation and thereby wrest the control of its property and business from its duly elected officers, where such charges of misconduct are denied and where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree.

[4. Whether or not a mere deadlock in the affairs of a corporation, caused by contending factions among the stockholders, preventing an election of directors and a harmonious conduct of its business, would be sufficient ground for a court of equity by final decree to dissolve the corporation, appoint a receiver, and direct a sale of the corporate property and a distribution among the shareholders, not decided.]

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order denying a motion for the appointment of a receiver *pendente lite.*

For the appellants there was a brief by *Frank M. Hoyt,* attorney, and *Glicksman, Gold & Corrigan,* of counsel, and oral

argument by *Mr. Hoyt* and *Mr. Nathan Glicksman.* They contended, *inter alia,* that the power of the courts to appoint receivers for corporations is not confined to the cases expressly provided for in the statutes, but is inherent in their general equity jurisdiction, and that the facts of this case presented a proper occasion for its exercise. *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900; *Gores v. Day,* 99 Wis. 276, 74 N. W. 787; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Adler v. Milwaukee P. B. Mfg. Co.* 13 Wis. 57; *Boothe v. Summit C. M. Co.* 55 Wash. 167, 104 Pac. 207; *State ex rel. Conlan v. Oudin & B. F. C. M. & M. Co.* 48 Wash. 196, 93 Pac. 219; *Weymouth v. Oudin,* 56 Wash. 315, 105 Pac. 1027; *Gibbs v. Morgan,* 9 Idaho, 100, 72 Pac. 733; *Columbian A. Club v. State,* 143 Ind. 98, 40 N. E. 914; *Sternberg v. Wolff,* 56 N. J. Eq. 389, 39 Atl. 397; *Einstein v. Rosenfeld,* 38 N. J. Eq. 309; *Merrifield v. Burrows,* 153 Ill. App. 523; *Miner v. Belle Isle I. Co.* 93 Mich. 97, 53 N. W. 218; *Sheridan B. Works v. Marion T. Co.* 157 Ind. 292, 61 N. E. 666; *Lawrence v. Greenwich F. Ins. Co.* 1 Paige Ch. (N. Y.) 586; 3 Cook, Corp. (6th ed.) § 746; 34 Cyc. 96.

For the respondents there was a brief by *Adolph Huebschmann,* attorney, and *Thomas H. Gill,* of counsel, and oral argument by *Mr. Huebschmann.*

TIMLIN, J. The plaintiffs own one half of the shares and the defendant *John E. De Wolf* in his own right and as administrator of William De Wolf owns half of the shares in the defendant *Avenue Rent Company,* a stock corporation organized under the general statutes of this state and having an authorized capital stock of 500 shares of the face or par value of $100 each. The corporation is entitled to but three directors. The defendant *John E. De Wolf* is now a director, president, and treasurer, and the plaintiff *Voss* is a director, and the shareholders are unable to agree upon or to elect a

third director or to agree upon the proper manner of conducting the corporate business. This deadlock was brought about as follows: The business of the corporation is buying, selling, and dealing in real and personal property, leases and leasehold interests, constructing buildings, renting and leasing buildings, etc. It owns a ninety-nine year lease of a certain parcel of land with buildings and improvements, and sublets the same. By the articles of organization the president has general supervision of the business and affairs of the corporation, subject to the control of the board of directors. The president and treasurer must be directors, while the secretary need not. The treasurer is to have the custody of the moneys of the corporation and disburse the same as prescribed by the by-laws or as authorized by the board of directors. A by-law requires that all money belonging to the company shall be by the treasurer deposited in such bank as the board of directors shall approve, to be thence drawn out by checks by both president and treasurer. There was originally a smaller amount of capital stock and three shareholders, each having an equal number of shares, but by purchase one shareholder was eliminated and the capital stock was increased, and it came about that the principal persons interested as shareholders were *Herman Katz* and *John E. De Wolf*. The plaintiff *Voss* holds one share under *Herman Katz,* and William De Wolf held one share which he received from *John E. De Wolf*. With the consent of *Mr. Katz, John E. De Wolf,* William De Wolf, and *Mr. Katz* constituted the board of directors. The offices were so distributed that *Mr. Katz* was president, *John E. De Wolf* was vice-president and treasurer, and one *Reitman,* an employee of *John E. De Wolf,* was made secretary. *John E. De Wolf* resided in Milwaukee and was more or less engaged in the real-estate business. *Mr. Katz* was required or disposed to spend a great deal of time in Europe in pursuit of his regular business. *Mr. Katz* resigned as president and *John E. De Wolf* resigned as vice-

president and he was elected president, and William De Wolf was elected vice-president, all with the consent of *Mr. Katz*. It was agreed between them that *John E. De Wolf* should have charge of the corporate affairs, which consisted of making subleases, collecting rents, paying for repairs, insurance, and taxes, and such like. For this *John E. De Wolf* was to receive as full compensation five per cent. of the amount of rent received. So far there is no dispute, but at this point the defendant denies that the five per cent. was agreed to be in full compensation. Returning from Europe *Mr. Katz* found that in addition to this five per centum on rents collected *John E. De Wolf* had charged to the corporation two per cent. on the total amount of the leases for procuring tenants or negotiating leases, such commissions amounting to $2,497.50. This the complaint avers to have been done fraudulently, without right or consideration, with intent to defraud, etc. The answer avers that it was pursuant to the agreement between the parties and a customary charge in Milwaukee. *John E. De Wolf* had been collecting the rents and mingled them as collected with his own funds, and refused to deposit the money in bank as required by the by-laws. This is met by a claim that *John E. De Wolf* collected these funds as real-estate agent and turned them over thereafter to himself as treasurer of the corporation, and that no bank had been designated by the directors, but that he had nevertheless deposited them in a bank. It is averred in the complaint that *Katz* and *De Wolf* met on January 14, 1911, and agreed upon a settlement of the above matters, whereby *John E. De Wolf* should continue to receive five per centum on rents collected and should have but one per centum for commissions on leases in question, making $1,248.75 instead of $2,497.50, and also should have one per cent. on certain leases negotiated by him thereafter, with provisions for a conditional refund and that all moneys remaining on hand after paying the necessary disbursements should be divided equally

between them, and quarterly reports made and the money divided each quarter, and that *Mr. Katz* should resign as a director and *Arthur Voss,* his bookkeeper, be elected in his stead, and that, all the stock being represented at this transaction, the meeting should be written up as a stockholders' meeting voluntarily held, and thereafter a resolution should be passed by the directors embodying this agreement. It is then averred that *De Wolf* failed to carry out this agreement in several particulars and that he did not enter up the same correctly and did not pay over, etc., whereupon on April 11, 1911, *Katz* rescinded the agreement and relies on the original transaction as a fraudulent conversion of corporate funds, misconduct in office, etc.

On November 7, 1911, William De Wolf died, leaving a vacancy in the board of directors, and *John E. De Wolf* was appointed his administrator. The charges of misconduct are, therefore, (1) the commingling of corporate with personal funds; (2) retaining wrongfully the commission on leases; (3) failure to render an account of all funds of the corporation to the stockholders; (4) failure to keep the corporate funds in a bank designated by the directors. Each of these charges of misconduct is met by the answer in denial or by new matter in the way of explanation and denial.

The complaint demands relief appropriate under sec. 3237, Stats. (1898), namely: that the defendant *John E. De Wolf* be removed from his office as president and treasurer and these offices declared vacant; that a time and place be fixed by the court for the holding of an election to elect a successor as director of William De Wolf and to elect a proper governing body and board of directors of said corporation; that *John E. De Wolf* be required to account for, pay over all moneys of the corporation in his hands, etc., and that he be required to deposit in the name of the corporation moneys belonging to it in some bank, and that a receiver be appointed to take charge, possession, and control of the business, prop-

erty, and affairs of said corporation with the usual power of receivers in such cases to conserve such property and the assets. In addition to the foregoing there is a prayer for relief not expressly authorized by sec. 3237, *supra,* viz.: that in the event that no board of directors can be elected, a receiver of the corporation be appointed with the usual power of receivers in such cases made and provided to sell and dispose of the property and wind up the affairs of the corporation. There is no claim made that either the plaintiff *Katz* or the defendant *John E. De Wolf* or the corporation is irresponsible or insolvent.

It is contended by the appellants that the learned circuit court refused to appoint a receiver on the sole ground that he lacked the power so to do. The order appealed from states that, "solely for the reasons stated in the decision of the court, ordered that plaintiffs' motion to appoint a receiver be and the same hereby is denied." The learned circuit court in the opinion mentioned stated:

"I think the statutes of this state have superseded the common law and that the authority to dissolve the corporation and appoint a receiver must be found to expressly exist by statute. I do not believe that the court has power to administer the affairs and assets of a perfectly solvent corporation engaged in business. Jurisdiction to do so only exists when facts are shown which bring the case under the provisions of the statute."

He also said in closing this opinion:

"When it is made to appear to the court that the governing body of the corporation is carrying it on successfully and with profit to the stockholders, that the corporation is solvent, and, as in this case, that the management of it does not involve the employment of a large force of clerical assistants or the expenditure of large sums of money, then there is no danger of mismanagement in that behalf, and that the managing officer is abundantly able to respond for any losses that there may be on account of his mismanagement, it would not be proper

for the court to appoint a receiver. The motion will therefore be denied."

The situation then is that the court decided by the order appealed from that he had no power to appoint a receiver in this case and that he would not appoint one if he had the power. Upon the proposition that he lacked power the learned circuit court erred. There is a class of cases authority for the proposition that when discretionary power exists in the court to grant or deny a motion, if the denial was based on the erroneous assumption that the power did not exist the order must be reversed and the case remanded to the circuit court in order that the discretion existing in the circuit court might be exercised. *Binder v. McDonald,* 106 Wis. 332, 82 N. W. 156; *Whitham v. Mappes,* 89 Wis. 668, 62 N. W. 430; *Hart v. Godkin,* 122 Wis. 646, 100 N. W. 1057. Reflection must convince one that this rule has no application to cases in which there is no sufficient ground shown for the exercise of the discretion which the court below failed to exercise, or to cases in which the court decided it had no power, but that if it had it should in its discretion deny the motion.

The situation here is quite novel, and the appellants cite and rely upon the fundamental principle that equity adjusts its reliefs and its remedies to new conditions, illustrating this by reference to the cases of *Boothe v. Summit C. M. Co.* 55 Wash. 167, 104 Pac. 207; *State ex rel. Conlan v. Oudin & B. F. C. M. & M. Co.* 48 Wash. 196, 93 Pac. 219; *Weymouth v. Oudin,* 56 Wash. 315, 105 Pac. 1027; *Gibbs v. Morgan,* 9 Idaho, 100, 72 Pac. 733; *Sternberg v. Wolff,* 56 N. J. Eq. 389, 39 Atl. 397; *S. C.* 56 N. J. Eq. 555, 42 Atl. 1078; *Featherstone v. Cooke,* L. R. 16 Eq. Cas. 298; *Merrifield v. Burrows,* 153 Ill. App. 523; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 53 N. W. 218; *Columbian A. Club v. State,* 143 Ind. 98, 40 N. E. 914. In some of these cases and under various circumstances a receiver of the corporate property

and affairs was appointed because of a deadlock between the shareholders.

The respondents meet this with a proposition that, independent of statute, a court of equity has no power to dissolve a corporation by selling and dividing the proceeds of its property among its stockholders at the suit of an individual stockholder in his own behalf and in his own name, citing *Strong v. McCagg,* 55 Wis. 624, 13 N. W. 895; *Hinckley v. Pfister,* 83 Wis. 64, 53 N. W. 21; *Brahm v. M. C. Gehl Co.* 132 Wis. 674, 112 N. W. 1097. To the point that a deadlock in the affairs of a corporation does not justify the appointment of a receiver respondents cite *Einstein v. Rosenfeld,* 38 N. J. Eq. 309; *Alabama C. & C. Co. v. Shackelford,* 137 Ala. 224, 34 South. 833; *Wallace v. Pierce-Wallace P. Co.* 101 Iowa, 313, 70 N. W. 216, 38 L. R. A. 122; *American L. & T. Co. v. Toledo, C. & S. R. Co.* 29 Fed. 416; *Loomis v. McKenzie,* 31 Iowa, 425; *Laurel Springs L. Co. v. Fougeray,* 50 N. J. Eq. 756, 26 Atl. 886, reversing *Fougeray v. Cord,* 50 N. J. Eq. 185, 24 Atl. 499; and other cases.

The development of corporation law began with a strictness of analogy between municipal and stock corporations which is no longer fully observed. The change from the ancient mode of creating corporations by special act to permit organizations by public declaration or contractual undertakings acknowledged and filed in a public office, and the great multiplication of corporations thereunder, caused some further change. There is unquestionably a broad power of equity applicable wherever wrong is shown of such a nature as to arouse the equitable jurisdiction. Whether in case of a mere deadlock between two or more contending groups of stockholders a court of equity would by final decree appoint a receiver and decree a sale of the corporate property and a distribution among the shareholders is not before us, and the disposition of this motion is not to be taken to affect that question. But where there is no imminent danger of loss

of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree, the courts will not, upon affidavits and in advance of a trial on the merits, by placing the property in the hands of a receiver, wrest the possession of the corporate property from the corporation and from those officers who are duly elected and who *prima facie* are entitled to administer the affairs of the corporation. That is the situation shown here. The charges of misconduct made in the complaint against defendants are fully met by the answer. The truth in this regard can be ascertained only after a trial. Their present possession of the corporate offices and affairs by *John E. De Wolf* and *Reitman* was taken with the consent of and by the act of the plaintiff *Katz,* and it is *prima facie* lawful. A deadlock in corporate affairs, or rather in the matter of electing directors, may be a serious thing forced upon the plaintiff or he may have himself brought it about. It could hardly be expected that any shareholder owning half the stock could have a receiver at pleasure by merely refusing to agree to the election of any director proposed by the other stockholder or stockholders. The effort of the parties here to agree was apparently not very strenuous. The plaintiffs cast 250 votes for the two plaintiffs for directors of the corporation, giving them the majority and control of the board of directors, while the defendants *John E. De Wolf* and his brother cast 250 votes for themselves, the existing directors, giving them control of the board of directors or perpetuating the control they already possessed. An affidavit used in resisting the motion for the appointment of a receiver states that *John E. De Wolf* offered a resolution at the stockholders' meeting reciting that it was apparent that none of these persons could be elected by a majority vote and resolving that some disinterested person be agreed upon to act as the third director. Also that a list of names of nineteen competent and unbiased men was submitted to the shareholders from which the plaintiffs might

select one, but the plaintiff *Herman Katz* refused so to do. What explanation or disproval shall develop when this case is tried on its merits and the litigants and their witnesses subjected to the test of cross-examination we cannot now know, but there is here no sufficient showing to authorize the circuit court, in the exercise of a just discretion, to appoint a receiver of the property of this corporation *pendente lite.*

By the Court.—Order affirmed.

KATZ and another, Appellants, vs. DE WOLF and others, Respondents.

November 20—December 10, 1912.

Katz v. De Wolf, ante, p. 337, followed.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The appeal is from an order denying a motion for the appointment of a receiver *pendente lite.*

For the appellants there was a brief by *Frank M. Hoyt,* attorney, and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *Mr. Hoyt* and *Mr. Nathan Glicksman.*

For the respondents there was a brief by *Adolph Huebschmann,* attorney, and *Thomas H. Gill,* of counsel, and oral argument by *Mr. Huebschmann.*

TIMLIN, J. This case relates to a different corporation, but otherwise presents the same questions as the preceding case of *Katz v. De Wolf, ante,* p. 337, 138 N. W. 1013, and is ruled by the decision in that case.

By the Court.—Order affirmed.

STACK, Appellant, vs. HICKEY and others, Respondents.

November 20—December 10, 1912.

Vendor and purchaser of land: Marketable title: Cloud upon title: Deed on foreclosure of second mortgage: Specific performance: Tender: Sufficiency: Tender at trial: Accounting: Discretion.

1. An apparent cloud upon the title to land, requiring a resort to evidence *aliunde* the record in order to show its invalidity, is sufficient to render the title unmarketable.
2. A title which is open to judicial doubt is not marketable.
3. A duly recorded sheriff's deed upon the foreclosure of a second mortgage is a cloud upon the title previously acquired under a foreclosure of the first mortgage, although the second mortgagee was a party to the earlier action; and one who had contracted to convey the land free and clear from incumbrances was not entitled to specific performance upon tendering merely the title acquired under such first foreclosure.
4. The decreeing of specific performance rests largely in the discretion of the court; and where a good title was not tendered by plaintiff until upon the trial of the action it was not an abuse of discretion to award specific performance only upon payment to defendants of the amount properly chargeable to plaintiff upon an accounting as to interest, taxes, rents, etc.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an appeal from part of a judgment in an action for specific performance of a land contract. Judgment was entered for the appellant for specific performance, but imposed upon him certain terms and conditions named in the findings and judgment. By the terms of the contract the respondents were to convey certain lands to the appellant, in consideration of which the appellant agreed to pay respondents $11,500 and transfer to them free and clear from incumbrances, except the right to dig and maintain a tunnel under the surface of a part of the grounds, a good title by warranty deed and furnish abstract of title to certain lands in the city of Milwaukee, which included lots 8 and 9 in block 1 in Carl Buschardt's subdivision, being a subdivision of lot No. 3.

The controversy in the case arises out of whether or not a good title to these lots was tendered before the commencement of this action, and if not, whether the accounting was correct. The lots in question were incumbered with two mortgages, the first known as the Walz mortgage, and the other or second mortgage known as the Draves mortgage. The question of whether the title was a good title within the meaning of the contract results from the foreclosure of these mortgages.

One Sivyer held a sheriff's deed upon the foreclosure of the second mortgage, which was recorded and showed title in him to said lots 8 and 9 when this action was commenced. Upon production on the trial of a deed from Sivyer to respondents specific performance was adjudged on the terms set forth in the findings. The court below held the Sivyer deed a cloud upon the title and that respondents were entitled to interest on the $11,500, and on accounting the court concluded:

" . . . That the defendant is entitled to receive from said plaintiff said item of interest, namely $766.66, said item of rent received by said plaintiff, namely $712, said item of taxes paid by the defendants on said farm property, namely the sum of $118.90, said item of insurance paid by said defendants, namely the sum of $6.16, said item of repairs by said defendants, namely the sum of $8.07, or a total of $1,611.79, together with the costs and disbursements of this action, and an abstract of plaintiff's property brought down to date, free of expense to said defendants.

"That the plaintiff is entitled to an offset against the said sum of $1,611.79 and the costs and disbursements of this action, for said item of taxes paid by the plaintiff, namely the sum of $128.80, the said item of rent received by the defendants for said farm property, namely the sum of $275, the said item of insurance paid by the plaintiff, namely the sum of $17.42, the said item of repairs paid by the plaintiff, namely the sum of $83.45, or a total of $504.67, together with the sum of $125 damages, as found in the fifteenth finding of fact, or a total of $629.67; that said plaintiff is also entitled to receive from said defendants an abstract of said farm property brought down to date, free of expense. . . ."

For the appellant there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *J. L. O'Connor.* They contended, *inter alia,* that the sheriff's deed to Sivyer did not constitute an incumbrance or render appellant's title defective or unmarketable. *Lewis v. C. & N. W. R. Co.* 97 Wis. 368, 72 N. W. 976; *McLean v. Hoehle,* 98 Wis. 359, 363, 74 N. W. 120; sec. 3169, Stats. (1898); *Ames v. Storer,* 98 Wis. 372, 379, 74 N. W. 101; *Pixley v. Huggins,* 15 Cal. 127, 133; 6 Pom. Eq. Jur. (3d ed.) p. 1238, n. 33; *Gilman v. Van Brunt,* 29 Minn. 271, 13 N. W. 125; *Lick v. Ray,* 43 Cal. 83, 88; *Sanxay v. Hunger,* 42 Ind. 44, 49; *Ward v. Dewey,* 16 N. Y. 519; 4 Pom. Eq. Jur. (3d ed.) § 1399, p. 2755; *Moore v. Cord,* 14 Wis. 213; *Meloy v. Dougherty,* 16 Wis. 269; *Robertson v. Kinkhead,* 26 Wis. 560; *Shepardson v. Milwaukee Co.* 28 Wis. 593; *Brown v. Cohn,* 88 Wis. 627, 636, 60 N. W. 826; *Cornish v. Frees,* 74 Wis. 490, 43 N. W. 507; *Smith v. Zimmerman,* 85 Wis. 542, 55 N. W. 956; *Davenport v. Stephens,* 95 Wis. 456, 70 N. W. 661; *Suring v. Rollman,* 145 Wis. 490, 497, 130 N. W. 485.

William E. Burke, for the respondents, cited, among other cases, *Mississippi River L. Co. v. Blue Grass L. Co.* 131 Wis. 10, 110 N. W. 796; 36 Cyc. 633, 634, and cases; *Gates v. Parmly,* 93 Wis. 294, 313, 66 N. W. 253, 67 N. W. 739; *Pyrke v. Waddingham,* 10 Hare, 1; *Mullings v. Trinder,* L. R. 10 Eq. 448; *Sturtevant v. Jaques,* 14 Allen, 523; *Swayne v. Lyon,* 76 Pa. St. 436; *Speakman v. Forepaugh,* 44 Pa. St. 363; *Street v. French,* 117 Ill. 342, 35 N. E. 814; *Fleming v. Burnham,* 100 N. Y. 1, 2 N. E. 905, 909; *Zane v. Weintz,* 65 N. J. Eq. 214, 55 Atl. 641, 644; *Daniel v. Shaw,* 166 Mass. 582, 44 N. E. 991; *Herman v. Somers,* 158 Pa. St. 424, 27 Atl. 1050, 38 Am. St. Rep. 853; *Dobbs v. Norcross,* 24 N. J. Eq. 327; *Nicol v. Carr,* 35 Pa. St. 381; *Rosier v. Graham,* 146 Mo. 352, 48 S. W. 470.

KERWIN, J. But two questions are involved upon this appeal: (1) Whether there was a cloud upon the title to

lots 8 and 9 in question, such as to render it unmarketable under the agreement to convey a good title; and (2) Whether the accounting was proper.

1. The contention of the appellant is that the foreclosure of the Walz, or first, mortgage cuts off all rights of the mortgagee, Draves, in the lots under the second mortgage, and that, the title acquired under the first foreclosure having passed to the appellant before this action was brought, appellant had and tendered a good title, therefore was entitled to specific performance at the time of such tender. On foreclosure of the second mortgage the sale was confirmed by the court and the property bid in by Frederick Sivyer, administrator *de bonis non* of the estate of Draves, and a sheriff's deed executed to him, which was duly recorded.

We are furnished by counsel on both sides with very able and exhaustive briefs as to what constitutes marketable title and cloud upon title to real estate. On the part of appellant many authorities are cited to the point that the foreclosure of a prior mortgage, when a second mortgagee is a party, cuts off such second mortgagee, and also that a deed from a stranger to the title does not create a cloud, nor a deed void upon its face. Also that a mortgage by one having no title or foreclosure thereof is not a cloud upon title, or, if the invalidity of that which is alleged to be a cloud appear on the face of the record by which it is shown to exist, it may be no cloud so as to render the title unmarketable. In determining what is a cloud it is sufficient, however, that the defect in title be at least an apparent cloud, rendering resort to evidence *aliunde* the record necessary in order to show its invalidity. *Pier v. Fond du Lac,* 38 Wis. 470; *Suring v. Rollman,* 145 Wis. 490, 130 N. W. 485.

The claim of title under the Sivyer deed was a claim under a judicial sale and cannot be said to show its invalidity upon its face nor in connection with the first foreclosure. Many facts *aliunde* the record may have existed and entered into

the adjudication upon the second or Draves foreclosure sale which gave Sivyer title or interest in the property notwithstanding the first foreclosure. The mere fact that Sivyer held under a sheriff's deed upon a judicial sale fair upon its face rendered the title to the lots unmarketable.

The respondents under the agreement were entitled to a good title, one that they could hold in peace and not be obliged to litigate to determine whether the deed to Sivyer on judicial sale conveyed any interest or not. *Dobbs v. Norcross,* 24 N. J. Eq. 327; *Zane v. Weintz,* 65 N. J. Eq. 214, 55 Atl. 641; *Fleming v. Burnham,* 100 N. Y. 1, 2 N. E. 905. A title which is open to judicial doubt is not marketable. *Gates v. Parmly,* 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; 36 Cyc. 634; *Speakman v. Forepaugh,* 44 Pa. St. 363; *Swain v. Fidelity Ins., T. & S. D. Co.* 54 Pa. St. 455; *Street v. French,* 147 Ill. 342, 35 N. E. 814; *Moore v. Williams,* 115 N. Y. 586, 22 N. E. 233; *Daniell v. Shaw,* 166 Mass. 582, 44 N. E. 991.

There can be no doubt upon the record before us that the deed to Sivyer constituted a cloud and rendered the title unmarketable within the meaning of the agreement, therefore respondents were not obliged to accept it.

2. After action was commenced and upon the trial appellant tendered a quitclaim deed from Sivyer to respondents of lots 8 and 9 and thereupon the court below awarded specific performance, but charged the appellant with the sums heretofore set out in the statement of facts as properly chargeable against him, on the ground that he was not entitled to specific performance until he tendered the deed. We think the court below was clearly right in holding that the sheriff's deed to Sivyer, upon foreclosure of the second mortgage, was a cloud upon the title to said lots 8 and 9, hence that the title offered by appellant before action brought was not a good title within the meaning of the contract. This being so, we cannot say that the court below abused its discretion in stating the ac-

count between the parties as appears from the statement of the case herein. The right to specific performance rests largely in the discretion of the court, and will not be decreed when for any reason it would be inequitable. *Northwestern Nat. Bank v. Superior,* 103 Wis. 43, 79 N. W. 54; *Hunholz v. Helz,* 141 Wis. 222, 124 N. W. 257; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532; *Menasha v. Wis. Cent. R. Co.* 65 Wis. 502, 27 N. W. 169; *Williams v. Williams,* 50 Wis. 311, 6 N. W. 814. We find no ground for disturbing the judgment.

By the Court.—The judgment is affirmed.

PEERLESS MINERAL SPRINGS COMPANY, Respondent, vs. GERMAN AMERICAN INSURANCE COMPANY OF NEW YORK, imp., Appellant.

November 20—December 10, 1912.

(1) *Continuance: Absence of witness: Diligence.* (2) *Fire insurance: Ownership of property: Loss payable to trustee: Trust deed a mortgage.*

1. An application for a continuance because of inability to procure the testimony of a nonresident witness, made nearly two years after issue joined and after the cause was called for trial, was properly denied on the ground of lack of diligence, where no attempt to take the deposition of the witness had been made.
2. Where a fire insurance policy provided that the loss if any should be payable to a certain person, "trustee, as his interest may appear," the insurer was chargeable with knowledge of the character of the trust; and where such trustee was the grantee named in an ordinary trust deed executed by the insured to secure payment of its corporate bonds, that deed was in legal effect a mortgage for the purposes of the insurance, and did not make the trustee the owner of the property or render the policy void on the ground that the insured was not the owner.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Gill & Barry,* and oral argument by *A. R. Barry.*

For the respondent there was a brief by *Lorenz & Lorenz,* attorneys, and *Carl Muskat,* of counsel, and oral argument by *Mr. Muskat.*

TIMLIN, J. This is an action to recover on a policy of insurance against loss by fire in the sum of $5,000, covering the sanatorium of the respondent and running from June 16, 1909, to June 16, 1910, containing also the following: "Subject to all the stipulations, provisions, and conditions of this policy, the loss if any on building is payable to D. S. Roberts, trustee, as his interest may appear." D. S. Roberts was made a defendant in the action, and the complaint prayed that his interest be ascertained and determined.

Error is assigned because the circuit court refused a continuance on application of the defendant made on May 13, 1912, after the case was called for trial. Issue had been joined since July 9, 1910, and the alleged ground for continuance was the inability to procure the testimony of one Mrs. Cobine, who resided in Chicago. There was no attempt to take her deposition during the time the cause was pending. Counsel contend that under the laws of Illinois such deposition could not be taken, citing *McIntyre v. People ex rel.* 227 Ill. 26, 81 N. E. 33, and *Martin v. People,* 77 Ill. App. 311. These cases merely decide that a witness cannot be compelled to give her deposition before a notary public. We do not understand that the courts of Illinois refuse to extend the comity of letters rogatory to the courts of other states. There was no reversible error in denying the application for a continuance on the ground of lack of diligence.

The defendant D. S. Roberts answered to the complaint,

setting up a copy of the instrument under which he claims, calling it a mortgage or trust deed, securing twenty bonds of the plaintiff aggregating $10,000. Thereupon the defendant amended its answer to allege that the plaintiff's interest was not that of unincumbered and sole owner of the insured property, but that D. S. Roberts was the owner under this trust deed. It is contended that upon this showing the complaint should have been dismissed.

When the defendant executed this policy making the loss if any payable to D. S. Roberts, trustee, as his interest might appear, it contracted with the insured for the benefit of Roberts as trustee to that extent. It cannot be heard to say, after making such an indorsement on its policy, that it did not know he was trustee, and it must at its peril ascertain the nature and character of his trust. It would be a strange sort of commercial morality which would justify one in contracting with another to pay what might become due on the contract to a third person as trustee as his interest might appear and then defeat the obligation of the contract upon proof that such third person was a trustee. But the so-called trust deed is in the form ordinarily used to secure railroad and other negotiable bonds. It is in substance and legal effect a mortgage for the purposes of insurance. *Wis. Cent. R. Co. v. Wis. River L. Co.* 71 Wis. 94, 36 N. W. 837; *Central T. Co. v. Burton,* 74 Wis. 329, 43 N. W. 141. *Marvin v. Titsworth,* 10 Wis. 320, is overruled by *Goodrich v. Milwaukee,* 24 Wis. 422, in its most vital and essential part, but even there (10 Wis. 329) it was said: "There can be little question that under the circumstances a court of equity, upon a proper application, would have given effect to that intention as an equitable mortgage, notwithstanding the irregularity of the instrument." *Dictum* from this overruled case cannot, however, now be put forward as authority. To now go back to the theory that a mortgage security could not be taken in the form of a trust deed would unsettle many titles and many se-

curities in this state. So far as the writer's observation goes, this is a common form of securing bonds of private and *quasi*-public corporations. This is how it was treated by the covenant in the policy to pay the trustee as his interest should appear, and this is what it is in law as to such insurer.

By the Court.—Judgment affirmed.

STOLLENWERK and others, Respondents, vs. KLEVENOW and others, Appellants.

November 20—December 10, 1912.

Injunction: On whom binding: Town supervisors: Persons having notice: Violation: Contempt of court: Punishment: Procedure: Failure to find essential facts: Harmless errors: Imposing penalty: Attorneys' fees: Ditches and drains.

1. A town supervisor who, after service upon him of an order restraining the taking of any steps toward the construction of a drainage ditch, with another person having knowledge of the injunction, resorted to a subterfuge whereby the latter dug the ditch under arrangement with a landowner who was to pay him therefor and in return receive a rebate of the drainage tax levied against his land, were properly convicted of contempt of court for violation of the injunction.
2. Where an injunctional order was directed against certain defendants as the board of supervisors of a town, it is no defense in a proceeding for contempt that in doing the prohibited acts they were not acting as a town board but as agents of the state, exercising police power.
3. An injunctional order restraining certain defendants, as the board of supervisors of a town, and all persons acting under or by virtue of their authority, from proceeding with the construction of a drainage ditch, was binding not only on such defendants but on all persons having notice of it.
4. Acts alleged to be a violation of an injunctional order are not punishable under secs. 3477, 3489, 3490, Stats. (1898), unless they were calculated to or actually did defeat, impede, or prejudice the rights or remedies of a party to an action; and the court should so determine and adjudge before imposing any

fine, and should also determine and adjudge whether or not actual loss resulted to any party, so that proper disposition may be made of the fine imposed.

5. Failure of the trial court to find these essential facts in express terms is not prejudicial error since the enactment of sec. 3072*m*, Stats. (Laws of 1909, ch. 192), if the record affirmatively shows that the misconduct found was in fact calculated to impede or prejudice the rights of a party and that such party suffered loss in consequence thereof.

6. Where an action was commenced by the owners of lands at the lower end of a proposed drainage ditch, primarily to prevent the collection of a tax for benefits where damage rather than benefits would result, and to prevent the flooding of their lands, the construction of a small part only of the ditch above them, in violation of an injunctional order, was calculated to defeat, impede, and prejudice their rights, even though actual damage was not thereby done to their lands; and such facts appearing in the record sustain the imposition of a penalty upon the guilty persons.

7. In such case it was the duty of the plaintiffs to bring to the attention of the court the fact that its order was being set at defiance, and to employ attorneys for that purpose and, where defendants contested the proceeding and sought a writ of prohibition from the supreme court, to instruct their attorneys to resist that application; and it was proper to impose upon the guilty parties the payment of attorneys' fees so incurred.

8. The fact that in such case the money was ordered paid to the attorneys instead of to the parties, was at most an irregularity without prejudice, and does not call for a reversal.

9. *Emerson v. Huss*, 127 Wis. 215, distinguished.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed as to two defendants; affirmed as to the others.*

The complaint shows that the plaintiffs are owners of farm lands in the town of Lake, Milwaukee county, through which a drainage ditch has run for a number of years; that the defendants *Klevenow, Gomber,* and *Clemens* are the members of and constitute the board of supervisors of the town of Lake; that certain proceedings were instituted pursuant to sec. 1359, Stats. (1898), for the purpose of laying out, widening, enlarging, and straightening said ditch, and that the pro-

ceedings were carried on to a point where the taxes for the construction of the ditch were assessed and collected; that by reason of certain defects in the proceedings the whole proceedings were invalidated, and plaintiffs prayed for a permanent injunction restraining the construction of the ditch and for costs. The defendants answered by a general denial to practically all the allegations of the complaint. On June 14, 1911, an injunctional order was issued restraining the defendant board of supervisors, their agents, servants, and employees, and all persons acting under and by virtue of the authority of said defendants, from taking any steps in connection with the construction of the ditch. On July 22, 1911, an order was obtained by the plaintiffs directing the defendants and one *Peter Dinnauer,* an alleged employee of the defendants, to show cause why they should not be punished for contempt for violating the said injunctional order. A hearing was had thereon, and at the close of the testimony the court ordered that judgment be entered adjudging the defendants *Klevenow, Gomber,* and *Clemens,* and *Dinnauer,* guilty of contempt. From an order and judgment adjudging said parties guilty of contempt and requiring them to pay to the attorneys of the plaintiffs the sum of $167.49 to purge themselves of such contempt, this appeal is taken.

For the appellants *Klevenow, Gomber,* and *Clemens* there was a brief by *Otjen & Otjen,* and oral argument by *Henry Otjen.*

Charles E. Hammersley, for the appellant *Dinnauer.*

For the respondents there was a brief by *Geo. J. Graebner* and *E. W. Van Dyke,* and oral argument by *Mr. Van Dyke.*

Barnes, J. The material questions on this appeal are: (1) Did any of the defendants violate the injunctional order, and, if so, which of them? (2) Was the proper judgment entered and the proper penalty inflicted?

On his own testimony *Dinnauer* was clearly guilty of vio-

lating the injunctional order. He testified in substance that *Klevenow* told him that he might arrange with one of the landowners (Wagen) to dig the ditch, and that when Wagen O.K.'d the work the town board would refund to him the amount of the special tax assessed against his land for ditch construction and Wagen could then pay it over to the witness (*Dinnauer*), and that the work was done pursuant to this arrangement, part of it having been done after the injunctional order was served on *Dinnauer*. This testimony showed that *Klevenow* and *Dinnauer* were resorting to a subterfuge to render the injunction nugatory. The evidence of *Dinnauer* and Wagen amply warranted the court in finding that supervisor *Klevenow* was likewise guilty.

The court found as a fact that *Klevenow*, in authorizing *Dinnauer* to dig the ditch, acted for and in behalf of himself and the defendants *Gomber* and *Clemens*, who with *Klevenow* made up the board of supervisors. The case against *Gomber* and *Clemens* depends on this finding. We have been unable to find any evidence in the record to sustain it. These defendants denied under oath that *Klevenow* acted for them or pursuant to any understanding with them or that they had any knowledge of the employment of *Dinnauer*. There is one *ex parte* affidavit in the record which might be said to raise a suspicion that *Clemens* might be guilty. It relates to a different transaction from the one on which the contempt proceedings were predicated, and if relevant at all we deem it insufficient to establish the charge of which *Clemens* was found guilty. Without further discussion of the evidence, we conclude that it was sufficient to sustain a judgment against *Dinnauer* and *Klevenow* and insufficient to sustain one against *Gomber* and *Clemens*.

The contention that, the injunction being directed against the defendants as supervisors of the town, it did not affect them, because, in doing what they were charged with, they were not acting as a town board but as agents of the state ex-

ercising police power, does not merit serious consideration. When the three gentlemen who comprised the town board were served with the injunctional order there was just one thing for them to do while it remained in force, and that was to obey it rather than experiment with it. 2 High, Injunctions (4th ed.) § 1427. The order was not only binding on the defendants but on all persons having notice of it. *Poertner v. Russel,* 33 Wis. 193; 22 Cyc. 1011, and cases cited in note 94; Id. 1012, and cases cited in notes 2 and 3.

It is argued that the findings of fact and conclusions of law do not authorize the penalty imposed on appellants.

Sec. 3477, Stats. (1898), provides that "Every court of record . . . shall have power to punish by fine and imprisonment, or either, any . . . misconduct by which the rights or remedies of a party in an action . . . may be defeated, impaired, impeded or prejudiced" in certain enumerated cases which cover the violation of an injunctional order.

Sec. 3489, Stats. (1898), provides that "If, upon the hearing . . . the court shall adjudge the defendant to have been guilty of the misconduct alleged and that the misconduct was calculated to or actually did defeat, impede or prejudice the rights or remedies of any party in an action or proceeding pending in such court, it shall proceed to impose a fine or to imprison him, or both, as the nature of the case shall require."

Sec. 3490 provides that "If an actual loss or injury has been produced to any party by the misconduct alleged the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him and to satisfy his costs and expenses, instead of imposing a fine upon such defendant. . . . Where no such actual loss or injury has been produced the fine shall not exceed two hundred and fifty dollars over and above the costs and expenses of the proceedings."

This court considered these statutes in *Emerson v. Huss,* 127 Wis. 215, 106 N. W. 518, and construed them so far as it was necessary to do so in deciding the case. Three points

were very definitely passed upon: (1) that the misconduct complained of was not punishable unless it was calculated to or actually did defeat, impede, or prejudice the rights or remedies of some party; (2) that it was necessary for the court to determine and adjudge that the misconduct complained of was calculated to or did defeat, impede, or prejudice the rights or remedies of a party, before any fine was imposed; and (3) that it was necessary to adjudge and determine whether or not the misconduct complained of resulted in actual loss to any party, so that the court might make the proper disposition of the fine imposed.

The adjudication of the court in this case does not comply with the requirements of the *Emerson Case.* The papers were probably drawn without consulting the case referred to and without paying very close attention to the statutes cited. The court found as a fact, and as a conclusion of law as well, that the injunctional order was violated by defendants and their servant *Dinnauer,* and as a conclusion of law found that they were guilty of contempt, and ordered them to appear before the court to show cause why they should not be punished.

When the parties appeared before the trial court considerable evidence was taken as to the damages which the plaintiffs suffered by reason of the acts complained of, which damages consisted in part of attorneys' fees incurred in bringing the parties found guilty before the court for punishment and in resisting the issuance of a writ of prohibition from this court which the defendants had applied for, and which damages consisted also in part of alleged injury to the lands of some of the plaintiffs.

The final order and judgment recited that the parties found guilty had failed to show cause why the court should not proceed to the determination of the question of damages resulting to the plaintiffs from the violation of the injunctional order, and the judgment directed the parties found guilty to pay the attorneys for the plaintiffs $167.49. It will be noted that

the court does not say in so many words in the judgment that the violation complained of was calculated to or did defeat, impede, or prejudice the rights of the plaintiffs, and neither does it say in express words that the damages assessed were actually incurred. In these respects it fails to follow the *Emerson Case.*

Since that case was decided the legislature has passed sec. 3072*m,* Stats. (Laws of 1909, ch. 192), which provides that "No judgment shall be reversed . . . in any action or proceeding, civil or criminal, . . . for error as to any matter of . . . procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse . . . the judgment."

This court has endeavored to give full force and effect to this legislative declaration, and when former precedents have stood in the way of its doing so it has not hesitated to decline to follow them. For a typical example reference is made to *Hack v. State,* 141 Wis. 346, 124 N. W. 492. A legitimate distinction can be drawn between the two cases, but it is altogether probable that, had the facts in the *Emerson Case* been identical with those in this case, it would have been decided just as it was. The trial court, we must assume, had the statute before it when it imposed the penalty and was satisfied that the acts complained of were calculated to defeat, impede, or prejudice the rights of the plaintiffs. Otherwise the penalty would not have been imposed, because the statute is clear and explicit upon the point and could hardly be misinterpreted or misconstrued. The court did not realize that the judgment should recite the fact, or, if it did, was careless in signing a judgment from which the recital was omitted.

If as a matter of fact the record affirmatively shows that the misconduct found was calculated to impede or prejudice the rights of the plaintiffs and that they suffered loss in con-

sequence thereof, then no harm or prejudice has resulted to the appellants because of the blunders complained of, and the errors were not prejudicial.

The plaintiffs set forth in their complaint, among other things, that the town board proceeded arbitrarily in the assessment of benefits; that plaintiffs were required to pay in the aggregate nearly $1,300 for benefits, when as a matter of fact the proposed ditch was not a benefit but a positive damage to them; that their property was located near the lower end of the proposed ditch, and the widening and deepening of such ditch would result in carrying the waters from the higher lands through which the upper end of the ditch was constructed down to the lands of the plaintiffs much more rapidly than if the ditch was not widened and deepened; that the connection with the lower end of the ditch would not admit of a rapid discharge of the water therefrom, and that in effect the water would become dammed up at its lower extremity and flood and submerge the lands of the plaintiffs. Primarily the action was commenced to prevent the collection of a tax for benefits where damages and no benefits resulted and to prevent the flooding of plaintiffs' lands.

If each of the upper owners undertook to dig the proposed ditch through his own land and there was then refunded to him the amount of the tax assessed against his property, it is obvious that one of the essential and vital things would be accomplished which the plaintiffs sought to prevent, to wit, a more rapid discharge of an augmented supply of water opposite to and on their lands. The plaintiffs were not obliged to wait until all of the work had been done and the consequential damage had resulted. They had the right under their injunctional order, so long as it remained in force, to have the *status quo* preserved *pendente lite.* The digging of a piece of ditch through Wagen's land might not cause actual damage to the plaintiffs so long as conditions remained unchanged on either side of this parcel of land. But the trial court found

evidence of a purpose to enlarge and deepen the upper portion of the ditch, and on the showing made such enlargement would be well calculated to result in loss and damage to the plaintiffs or some of them.

Evidence was given tending to show that the enlargement of the ditch on Wagen's land caused some of the lower lands to be flooded, whereby at least one of the plaintiffs suffered actual loss. The court did not deem the claim to be sufficiently established to warrant it in finding that actual damage to the party's real estate resulted from what was done. There can be no doubt, however, that the misconduct complained of was calculated to defeat, impede, and prejudice the rights of the plaintiffs. The point had not yet been reached where actual damage had been done to the plaintiffs' lands, but a continuation of the work would, on the plaintiffs' theory, result in serious loss to them. They had the right to have the questions which they raised tried and determined, and so long as the injunction remained in force they had, as before stated, the right to preserve the *status quo*. They had the right to have their lands remain in the condition in which they were and the right to avoid going into court to collect damages for flooding them. Plainly the action complained of was calculated to prejudice or impede those rights. It is quite obvious that the court so found, because, unless it did, it would have no authority to impose the penalty which it did, and because the record not only warranted such a conclusion but would not warrant any other. The facts being as stated, we hold that the defendants were not prejudiced by the failure of the court to recite in the judgment that the misconduct found was calculated to or did defeat, impede, or prejudice the rights of the plaintiffs, that fact being shown to exist by the record.

The last question which calls for discussion is whether the court was warranted in imposing a penalty for the benefit of the plaintiffs, it having found that the violation of the injunc-

tion did not result in actual damage to the land of the plaintiffs or in other pecuniary loss, except such as resulted from the employment of attorneys.

It was manifestly the duty of the plaintiffs in this case to bring to the attention of the court the fact that its order was being set at defiance and to employ attorneys for that purpose. When the defendants undertook to prohibit the trial court from taking action in the matter, it was proper for the plaintiffs to instruct their attorneys to resist that proceeding also. The employment of attorneys meant assuming an obligation that they be paid for their services. Such employment resulted in loss and damage to the plaintiffs to the extent of the amount they were legally obliged to pay for such services. Such loss was occasioned solely by the contumacious conduct of certain of the defendants. Actual loss and damage was produced and resulted to the plaintiffs by reason of the misconduct of which they complained, within the meaning of sec. 3490, Stats. (1898), and therefore the court was right in awarding indemnity to the plaintiffs. The fact that the money was ordered paid to the attorneys instead of to the parties who employed them is at best an inconsequential irregularity. The allowance was for attorneys' fees that evidently had not been paid, and it made no practical difference whether the payment was made to the attorneys or to the parties. In either case plaintiffs were indemnified.

It has been heretofore said that the facts in this case are not entirely identical with those in *Emerson v. Huss,* 127 Wis. 215, 106 N. W. 518. In the latter case no proof of any kind was preserved in the record to show that the violation of the order complained of was calculated to or did defeat, impede, or prejudice the rights of a party, and neither was any evidence offered as to what would be the reasonable value of the attorneys' fees in the contempt proceeding. Both of these elements are supplied in the case before us.

Some other questions are discussed by counsel, but we do not consider them of sufficient moment to warrant discussion.

By the Court.—The judgment is reversed as to the defendants *Christ Gomber* and *Wenzel Clemens,* and the cause is remanded with directions to set aside the judgment of conviction and dismiss the proceedings as to such defendants. As to the other defendants the judgment is affirmed.

WOTESHEK, Respondent, vs. NEUMAN, Appellant.

November 21—December 10, 1912.

Fraud: Exchange of lands: False representations as to taxes: Duty to make inquiry: Notice to agent: Collusion: Pleading: Evidence: Special verdict: Discretion.

1. A complaint alleging that plaintiff and defendant made an agreement for exchange of lands, whereby plaintiff was to assume and pay the taxes on certain lots which defendant was to convey to him; that as an inducement for the exchange defendant represented that such taxes would not exceed $200, although, as he knew or had reason to know, they amounted to $458.83; that in reliance upon such representations plaintiff entered into the agreement, and by reason thereof sustained damage in the sum of $266.83, states a good cause of action.
2. It is not necessary in all cases of fraud that the deception should have been by means of any trick or artifice. A mere falsehood relative to a material fact is often sufficient.
3. Although plaintiff's testimony in this case, corroborated by another witness, that defendant made the false representations alleged was contradicted by defendant and some members of his family who heard at least a part of the conversation, this court cannot say that a verdict for the plaintiff was not supported by such clear and convincing evidence as the law requires in proof of fraud.
4. There being nothing suspicious or improbable in defendant's statement that the taxes would not exceed $200, plaintiff had a right to rely thereon and was not bound to examine the city records to ascertain the truth.
5. Where a third person acts in collusion with an agent to defraud his principal, the latter is not chargeable with notice of information which the agent receives in the course of and relative to such collusive transaction; and this rule is especially

applicable where the agent is requested not to communicate such knowledge to his principal.

6. In an action based on alleged false statements by defendant as to the amount of the taxes on his lots, whereby plaintiff was induced to make an exchange and to assume payment of such taxes, evidence as to the relative value of the properties exchanged was admissible.

7. In actions for fraud great latitude in the introduction of evidence is allowed.

8. It is not an abuse of discretion, under sec. 2858, Stats. (Supp. 1906: Laws of 1903, ch. 390, sec. 1), to deny a request, made at the close of the testimony, for submission of a special verdict, when there is but a single issue, which can be clearly defined and succinctly placed before the jury in the form of a general verdict.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover damages for false representations made in a transaction resulting in the exchange of certain real estate between plaintiff and defendant. The complaint alleges, in substance, that on the 29th of December, 1910, the defendant and plaintiff entered into an agreement whereby the former, in exchange for certain lands, agreed to transfer to the latter certain lots situated in the city of Milwaukee; that the plaintiff agreed to assume and pay the taxes on said lots, both general and special, for the year 1910; that the defendant, as an inducement for the exchange of properties, represented, stated, and warranted to the plaintiff that the only special taxes levied against said lots were such as were levied for the grading and macadamizing of Burleigh street, which adjoins them, and that in no event would said assessment exceed the sum of $200; that, relying upon such statements and representations made by the defendant in regard to such taxes, the plaintiff entered into an agreement for the exchange and transfer of the properties. The complaint further alleges that the special tax levied against said lots for the grading and macadamizing of Burleigh street was not the only special

tax levied against them as was stated and represented by said defendant, but, on the contrary, there were special taxes levied against them for the improvement of Twenty-eighth street, which fact the defendant well knew or had reason to know, of which the plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that the taxes on said lots were not less than $200, as represented by the defendant, but on the contrary were $458.83, which fact defendant well knew or had reason to know, and of which said plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that as the result of plaintiff's relying upon the statements and representations of defendant and as a result of defendant's fraudulent concealment of facts which induced plaintiff to enter into the trade, the plaintiff has suffered a loss of $266.83 damages and costs.

The answer of the defendant admitted the ownership of the property mentioned in the complaint, the making of the agreement, and the assumption of the general and special taxes by the plaintiff for the year 1910, but denied the allegations as to fraud. Before the taking of any testimony the defendant objected to the admission of any evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which objection was overruled. The cause was submitted to a jury upon a general verdict, and they found for plaintiff in the sum of $258.83. The court ordered judgment for plaintiff for said amount.

The case was tried originally in the civil court of Milwaukee county. Upon an appeal by the defendant from such judgment to the circuit court for Milwaukee county the judgment of the civil court was affirmed, and the defendant appealed from such judgment of affirmance.

For the appellant there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *Otto H. Hackbarth.*

For the respondent there was a brief by *W. B. Rubin,* attorney, and *Max Schoetz, Jr.,* of counsel, and oral argument by *Mr. Schoetz.*

VINJE, J. In support of the demurrer *ore tenus* counsel for defendant argue that the complaint is insufficient because it does not allege all the essential facts and elements necessary in cases of fraud; that though the complaint alleges representations were made to the plaintiff, that the defendant fraudulently concealed the amount of special taxes, and that plaintiff relied upon the representations made, yet it does not allege that such representations or statements were false or untrue. They further argue that the complaint does not specify the means or method by which the defendant made the alleged representations or concealed the facts from plaintiff, nor does it allege that plaintiff was unable by the use of due diligence to obtain knowledge of the facts, nor that the defendant, by the use of any trick or artifice, prevented him from obtaining such knowledge or information; and in support of their position they cite *Kewaunee Co. v. Decker,* 30 Wis. 624; *Riley v. Riley,* 34 Wis. 372; *Landauer v. Vietor,* 69 Wis. 434, 439, 34 N. W. 229; *New Bank v. Kleiner,* 112 Wis. 287, 87 N. W. 1090. An examination of those cases will at once disclose that the allegations therein with reference to what constituted the false and fraudulent representations were materially different from those in the case at bar. Here the complaint alleges that the defendant knew, or had reason to know, that the taxes on his lots amounted to $458.83, and yet he represented to plaintiff that they would not exceed $200; that plaintiff relied upon such statements, and by reason thereof sustained damage in the sum of $266.83. Such allegations sufficiently charge misrepresentation, falsity, scienter, deception, and damage. When it is charged that a person knows or ought to know what the fact is, and that he makes representations contrary to such fact, there is a suffi-

cient allegation of false representations and of knowledge on his part that they are false, and when it is alleged that the party to whom they are made relies upon them and by reason thereof sustains damage, deception and damage are sufficiently averred. It is not necessary in all cases of fraud that the deception should have been by means of any trick or artifice. A plain, unvarnished falsehood relative to a material fact is often sufficient. The complaint states a good cause of action. It alleges that the defendant made representations relative to a material fact which were not true, and which were or ought to have been known by the defendant at the time they were made to be untrue; that the plaintiff was ignorant of their falsity and believed them to be true, and that, acting in reliance thereon, he was damaged. Such allegations sustain an action for fraud. *Helberg v. Hosmer,* 143 Wis. 620, 128 N. W. 439.

The claim is made that a motion for nonsuit should have been granted on the ground that the fraud was not proven by clear and convincing testimony, as the law requires. *Denoyer v. First Nat. Acc. Co.* 145 Wis. 450, 130 N. W. 475; *Richards v. Millard,* 146 Wis. 552, 131 N. W. 365. A careful perusal of the evidence shows that there is a direct conflict as to whether or not the defendant made the representations claimed by the plaintiff to have been made. Plaintiff's testimony is to the effect that the defendant specifically made such representations. In this he is supported by another witness. The defendant and some members of his family who were present and heard at least a part of the conversation deny that the representations were made. The jury found for the plaintiff, and we cannot say, upon such state of the evidence, that they were not convinced of the truth of their finding by clear and satisfactory testimony.

Defendant presumed to know that the taxes on his lots would not exceed $200, and plaintiff had a right to rely upon his positive statement to that effect. No duty devolved upon

him to examine the city records on the subject in view of the assertions made relative thereto by the defendant. There was nothing suspicious or improbable about the fact that the taxes would not exceed $200, and defendant cannot now be heard to say that the plaintiff should not have believed him when he made the statement. *Jacobsen v. Whitely,* 138 Wis. 434, 120 N. W. 285; *Hall v. Bank of Baldwin,* 143 Wis. 303, 127 N. W. 969.

There is evidence tending to show that one Herman Guettel acted as agent for both parties in the exchange of the properties and that the defendant stated to him the amount of the taxes on his lots, but requested him not to disclose the fact to the plaintiff, for the reason that if he did the deal would not be consummated. It is now claimed that notice to Guettel of the amount of taxes was notice to his principal, the plaintiff. But it cannot be successfully maintained that Guettel was plaintiff's agent so far as such information was concerned. If the testimony be true, then plaintiff's agent and defendant entered into a conspiracy to defraud plaintiff, and the rule is well settled that where a third person acts in collusion with an agent to defraud his principal, the latter will not be chargeable with notice of any information which the agent receives in the course of, and relative to, such collusive transaction, and it applies especially where the agent is requested not to communicate such knowledge to his principal. *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; 31 Cyc. 1596.

The court received testimony as to the value of the properties exchanged. It is claimed this was error. The testimony was introduced for the purpose of showing that plaintiff's contention that he assumed not to exceed $200 of taxes was correct. The relative value of the two properties would bear upon the question of the probability of such trade having been made as claimed by the defendant. 20 Cyc. 145. It is elementary that evidence of any fact relevant to any fact in issue is admissible. Moreover, in actions for fraud great lati-

tude in the introduction of evidence is allowed. *Kalk v. Fielding,* 50 Wis. 339, 344, 7 N. W. 296.

At the close of the testimony the defendant requested the submission of a special verdict. This the court refused, and it is claimed that such refusal was an abuse of discretion. Sec. 2858, Stats. (Supp. 1906: Laws of 1903, ch. 390, sec. 1), provides: "The court, in its discretion, may, and when either party, before the introduction of any testimony in his behalf, shall so request, the court shall direct the jury to find a special verdict." The request for a special verdict not having been made until the evidence was all in, the defendant was not entitled to it as a matter of right. In a case of this kind, where the only issue made by the testimony was as to whether or not the defendant had falsely represented to plaintiff that the taxes on his lots would not exceed $200, there was no abuse of discretion in refusing to submit a special verdict. The issue could be as clearly defined and as succinctly placed before the jury in the form of a general verdict as in the form of a special verdict.

Other errors relied upon to reverse the judgment are not deemed of sufficient importance to merit separate treatment.

By the Court.—Judgment affirmed.

GODFREY vs. WRIGHT, Respondent, and POTTER, Appellant.

November 21—December 10, 1912.

Mortgages: Foreclosure: Judgment for deficiency: Affirmative relief asked in answer by second mortgagee: Failure to serve on mortgagor: Jurisdiction: Void judgment: Setting aside.

1. An order in the original decree of foreclosure that a judgment for any deficiency be entered is a condition precedent to such a judgment.
2. Under sec. 2656*a*, Stats. (1898), where the answer of a second mortgagee, who was made a defendant in an action to foreclose the first mortgage, was not served upon the mortgagor, the court did not acquire jurisdiction of the mortgagor for the purpose of granting affirmative relief against him in favor of such second mortgagee.
3. In such a case a judgment for deficiency entered against the mortgagor in favor of the second mortgagee was void and might be set aside on motion at any time.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

The order appealed from stayed execution on a judgment for deficiency in foreclosure proceedings and set such judgment aside.

May 18, 1901, plaintiff commenced an action in the circuit court for Milwaukee county, making the debtor and mortgagor, *Walter H. Wright,* and *Laura W. Potter,* a second creditor and mortgagee of *Wright,* defendants. The complaint was in the usual form and was served upon defendants. The debtor did not appear. *Laura W. Potter* answered; admitting the allegations of the complaint, but claiming she was not holder of the legal title, although her interest was created by deed, in form; that it was given to secure *Wright's* indebtedness to her of $1,025.71. She asked for judgment protecting the rights of all parties. The answer was not served upon *Wright.* The court found facts requisite to a judgment of foreclosure in plaintiff's favor; also found facts in har-

mony with the answer of *Laura W. Potter,* and determined that, in case of a surplus arising from the sale to collect plaintiff's claim, she was entitled thereto on her claim. Judgment was so rendered and fixing the amount of the indebtedness to *Laura W. Potter* and providing for the payment of the surplus, if any, to her. The sheriff reported a deficiency to the amount of the indebtedness to her. The notice of motion to confirm the report was not served on *Wright,* but was on the attorney for defendant *Potter.* The report was confirmed and judgment for deficiency ordered in her favor. *Wright* had no notice thereof until a short time prior to January 24, 1912. He then notified *Laura W. Potter* that her judgment was void and demanded a release thereof. She refused, whereupon he moved the court, on affidavit setting forth the facts, for an order perpetually staying execution and setting the judgment aside. Both motions were heard together and granted with the usual costs. *Laura W. Potter* appealed.

For the appellant there were briefs by *Otjen & Otjen,* and oral argument by *Henry Otjen.*

Lawrence A. Olwell, for the respondent.

MARSHALL, J. The order must be affirmed, not because a case was made of "mistake, inadvertence, surprise or excusable neglect" under sec. 2832, Stats. (1898), which counsel for appellant seems to think was required; but because the judgment was void for want of jurisdiction to render it.

No foundation was laid for a judgment for deficiency against *Wright* in favor of his codefendant. No such judgment was ordered in the original decree. That was a necessary condition precedent. No service of *Laura W. Potter's* answer was made on *Wright* bringing him in for an adjudication of matters between them, as required by sec. 2656*a,* Stats. (1898). In mandatory language, such section provides that, where a defendant seeks affirmative relief against

a codefendant, an answer in the nature of a cross-complaint must be served on the party against whom relief is asked. Without such service the court does not obtain jurisdiction of the person for granting such relief nor of the subject in respect thereto. Though the court may have jurisdiction in the sense of power as to such subjects, it is as necessary to give notice to the codefendant, in the manner provided in the Code, that relief will be asked for, as for plaintiff to give notice to the principal defendant in order to render the court competent to give judgment against him in the former's favor.

If a party to an action be not brought into court by proper notice, a judgment against him therein is void and may be set aside on motion at any time, or reversed on appeal, the former being the better practice. *Sayles v. Davis,* 20 Wis. 302. The rule as regards setting aside a judgment for mere error or irregularity does not militate against judicial power to expunge a void judgment from the record. *Ætna L. Ins. Co. v. McCormick,* 20 Wis. 265. A judgment which is a nullity may be so expunged on motion at any time. *Sackett v. Price Co.* 130 Wis. 637, 641, 110 N. W. 821.

It is quite plain that the court in this case did not acquire jurisdiction of *Wright* for the purpose of granting any affirmative relief against him in favor of *Potter.* In all such cases a judgment assuming to dispose of the rights of the parties, is a nullity. *Falkner v. Guild,* 10 Wis. 563. Such a judgment should not be confused with one affected by mere error or irregularity, which cannot be dealt with in the court committing it after the term or within some statutory period, nor with a judgment affected with jurisdictional error of a judicial nature, leaving it good until vacated on motion or some direct proceeding to that end. The jurisdictional defect here goes to the extent of want of power of the trial court to deal with the matter at all under the circumstances, rendering the result open to collateral attack as utterly void.

By the Court.—The order is affirmed.

WILL OF REYNOLDS.

November 21—December 10, 1912.

Wills: Construction: Widow's election: Effect on other provisions: Intestate estate: "Residue:" Vesting of legacies: Stipulation for distribution contrary to will.

1. A will, after making certain specific bequests, gave the entire residue of testator's estate to trustees to hold for a period of ten years "for the purpose of distributing the residue as hereinafter provided." It then provided for the division of such residue at the end of the ten years, thirty per cent. to his wife and smaller portions to other named legatees. The widow elected to take under the statute. *Held*, that the renunciation by the widow did not cause the thirty per cent. willed to her to become intestate estate, to be paid over to the heir at law, but it remained a part of the residue disposed of by the will, to be distributed among the residuary legatees other than the widow.
2. The renunciation by a widow of the provision made in her husband's will and election to take under the statute should not be allowed to disturb the will or defeat the intended disposition of his other property, except so far as it necessarily interferes therewith.
3. Where the widow so renounces, the "residue" of the estate consists of the part of the general estate that remains after deducting debts, specific legacies, and the widow's share; but the intention of the testator as to the disposition of it is to be gathered from the four corners of the will under the facts and circumstances surrounding him.
4. A stipulation made in settlement of a will contest, but not signed by a charitable institution which was one of the residuary legatees, nor by the guardian *ad litem* of the minor legatees, pursuant to which the widow renounced the provision in her favor and the legacy given to her was to be treated as intestate property, contrary to the true construction of the will, must be disregarded and the will carried out according to its terms, except as necessarily modified by the widow's election.
5. Under the terms of the will stated above, the gifts to the residuary legatees must be regarded as vested, and only the time of distribution postponed until the expiration of the ten-year period.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

applicable where the agent is requested not to communicate such knowledge to his principal.

6. In an action based on alleged false statements by defendant as to the amount of the taxes on his lots, whereby plaintiff was induced to make an exchange and to assume payment of such taxes, evidence as to the relative value of the properties exchanged was admissible.
7. In actions for fraud great latitude in the introduction of evidence is allowed.
8. It is not an abuse of discretion, under sec. 2858, Stats. (Supp. 1906: Laws of 1903, ch. 390, sec. 1), to deny a request, made at the close of the testimony, for submission of a special verdict, when there is but a single issue, which can be clearly defined and succinctly placed before the jury in the form of a general verdict.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to recover damages for false representations made in a transaction resulting in the exchange of certain real estate between plaintiff and defendant. The complaint alleges, in substance, that on the 29th of December, 1910, the defendant and plaintiff entered into an agreement whereby the former, in exchange for certain lands, agreed to transfer to the latter certain lots situated in the city of Milwaukee; that the plaintiff agreed to assume and pay the taxes on said lots, both general and special, for the year 1910; that the defendant, as an inducement for the exchange of properties, represented, stated, and warranted to the plaintiff that the only special taxes levied against said lots were such as were levied for the grading and macadamizing of Burleigh street, which adjoins them, and that in no event would said assessment exceed the sum of $200; that, relying upon such statements and representations made by the defendant in regard to such taxes, the plaintiff entered into an agreement for the exchange and transfer of the properties. The complaint further alleges that the special tax levied against said lots for the grading and macadamizing of Burleigh street was not the only special

tax levied against them as was stated and represented by said defendant, but, on the contrary, there were special taxes levied against them for the improvement of Twenty-eighth street, which fact the defendant well knew or had reason to know, of which the plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that the taxes on said lots were not less than $200, as represented by the defendant, but on the contrary were $458.83, which fact defendant well knew or had reason to know, and of which said plaintiff was ignorant, and which fact the defendant fraudulently concealed from the plaintiff; that as the result of plaintiff's relying upon the statements and representations of defendant and as a result of defendant's fraudulent concealment of facts which induced plaintiff to enter into the trade, the plaintiff has suffered a loss of $266.83 damages and costs.

The answer of the defendant admitted the ownership of the property mentioned in the complaint, the making of the agreement, and the assumption of the general and special taxes by the plaintiff for the year 1910, but denied the allegations as to fraud. Before the taking of any testimony the defendant objected to the admission of any evidence under the complaint, for the reason that it did not state facts sufficient to constitute a cause of action, which objection was overruled. The cause was submitted to a jury upon a general verdict, and they found for plaintiff in the sum of $258.83. The court ordered judgment for plaintiff for said amount.

The case was tried originally in the civil court of Milwaukee county. Upon an appeal by the defendant from such judgment to the circuit court for Milwaukee county the judgment of the civil court was affirmed, and the defendant appealed from such judgment of affirmance.

For the appellant there was a brief by *Friedrich, Teall & Hackbarth,* and oral argument by *Otto H. Hackbarth.*

objections and to avoid all further controversy and litigation concerning the admission of said will to probate, the widow of said deceased, *Nellie M. Reynolds,* does hereby elect to take the share of the estate of said deceased as provided by law under sections 2171 and 2172 of the Statutes of the state of Wisconsin, which is understood to be a dower interest in any lands of which the deceased died seised, and one third of the net personal estate of said deceased which shall be in lieu of the annuity and legacy provided to be paid to her under said will.

"Third. The legacy to *Nellie M. Reynolds* of thirty (30) per cent. of the residue of the estate having lapsed by reason of her election to renounce such legacy and take the provision allowed her under the laws of the state of Wisconsin, the amount of such lapsed legacy being thirty per cent. of the residue of the estate of said deceased, descends to *Mrs. Emma R. Robinson* as sole heir at law of said deceased, and shall be paid to her as such heir at law by the executors of said will at the time of the payment of the specific legacies and widow's share of such estate, which distribution shall be made as soon as practicable after the expiration of the time limited for creditors to file claims against said estate under the laws of the state of Wisconsin.

"October 5th, 1909."

This stipulation was signed by all the legatees and beneficiaries under the will except the *Milwaukee Protestant Home for the Aged* and the guardian for the minor legatees. The attorney for the *Milwaukee Protestant Home for the Aged* signed the stipulation with the exception of the last paragraph. The guardian *ad litem* filed a statement objecting to the stipulation and agreement "so far as they attempt to announce the law relating to the time when, the manner in which, and the persons to whom disposition shall be made of that portion of the estate renounced by the widow."

February 24, 1911, the attorney for the *Milwaukee Protestant Home for the Aged* and the guardian *ad litem* petitioned the probate court for construction of the will, alleging their "doubt about the proper construction, meaning, and effect of

said will taken in connection with the stipulation and agreement of the widow to take the provision made by law."

The court held it had power to construe the provisions of the will without reference to the provisions of the stipulation, and that the thirty per cent. of the residue of the estate, which under the will was to go to the widow upon the termination of the trust estate, by reason of the widow's election to take the provision made for her by law remained part of the residue of the estate and was to be distributed at the end of the trust period as provided by the will.

On appeal to the circuit court the judgment of the probate court was affirmed except as to the payment of a small annuity and the distributive shares going to each residuary legatee, and as so modified the judgment was approved. The modifications made by the circuit court are immaterial to this appeal, except that the circuit court held that the vesting of the interests in the residue, which was to be distributed at the end of the trust period, was postponed until that time.

This is an appeal from the judgment of the circuit court.

A. C. Umbreit, for the appellant *Emma R. Robinson,* contended, *inter alia,* that the heir is not to be disinherited except by express declaration or devise or by necessary implication from the testator's language. *Anderson v. Wilson* (Iowa) 136 N. W. 134, 139; *Bond's Appeal,* 31 Conn. 183; *Reck's Appeal,* 78 Pa. St. 432; *Bowker v. Bowker,* 148 Mass. 198, 19 N. E. 213. A residuary bequest which fails or lapses for any cause, and is not otherwise disposed of by the will, becomes intestate estate and descends to the heir. *In re Bradley's Will,* 123 Wis. 186, 101 N. W. 393; *Harrington v. Pier,* 105 Wis. 485, 498, 82 N. W. 345; *McHugh v. McCole,* 97 Wis. 166, 177, 72 N. W. 631; *Will of Adelman,* 138 Wis. 120, 125, 119 N. W. 929; *Beekman v. Bonsor,* 23 N. Y. 298; *Kerr v. Dougherty,* 79 N. Y. 327; *Booth v. Baptist Church,* 126 N. Y. 215, 245, 28 N. E. 238; *Lyman v. Coolidge,* 176 Mass. 7, 9, 56 N. E. 831; *Dresel v. King,* 198 Mass. 546,

85 N. E. 77. It is entirely competent for legatees under a will to enter into contracts with each other in regard to their respective interests under the will, and, where their claims are conflicting, to compromise them. *Hatcher v. Cade,* 55 Ga. 359; *Wilkins v. Hukill,* 115 Mich. 594, 73 N. W. 898; *Ford's Estate,* 185 Pa. St. 420, 39 Atl. 1106. The agreement of all the legatees binding their respective interests is a valid consideration for the agreement of each. *Steinway v. Steinway,* 163 N. Y. 183, 57 N. E. 312. Legatees may agree to any division of the property devised to them that they see fit. If all the legatees are of age and the agreement is not vitiated by fraud, accident, or mistake, the division will bind all. And if some are minors, and they ratify it on coming of age, all are bound, and the title of each to the severalties so divided and set apart is perfect. *Brewster v. Demarest,* 48 N. J. Eq. 559, 23 Atl. 271; *Foote v. Foote,* 61 Mich. 181, 28 N. W. 90; *Hatcher v. Cade,* 55 Ga. 359. Such an agreement between legatees by way of stipulation will be enforced against the individual interests of those who join therein, and the omission of one of the legatees to sign the agreement will not invalidate it against those who did sign. *Woodward v. Woodward,* 16 N. J. Eq. 83.

Edgar L. Wood, for the executors and appellants, to the point that the thirty per cent. of the residue renounced by the widow became intestate estate, cited the following additional authorities: *Ford v. Ford,* 88 Wis. 122, 59 N. W. 464; *Burnet's Ex'rs v. Burnet,* 30 N. J. Eq. 595; *Witherspoon v. Watts,* 18 S. C. 396; *Sawyer v. Freeman,* 161 Mass. 543, 37 N. E. 942. He also contended that the stipulation should be sustained as to the interests of those who signed it, citing. among other cases, *Will of Dardis,* 135 Wis. 461, 115 N. W. 332; 40 Cyc. 2107; *Bailey v. Wilson,* 21 N. C. 182; *Smith v. Smith,* 36 Ga. 184; *Turner v. Campbell,* 59 Ind. 279; *Stevens v. Clough,* 70 N. H. 165, 47 Atl. 615; *Steinway v. Steinway,* 78 N. Y. 418, 37 N. Y. Supp. 742; *S. C.* 157 N. Y. 710, 53 N. E. 1132.

Thomas L. Kennan, for the respondent *Milwaukee Protestant Home for the Aged,* to the point that the widow's renunciation did not have the effect to make her share of the trust fund intestate estate, cited *Lewis v. Sedgwick,* 223 Ill. 213, 79 N. E. 14; *McMurphy v. Boyles,* 49 Ill. 110; *Requa v. Graham,* 187 Ill. 67, 58 N. E. 357; *Dunshee v. Dunshee,* 251 Ill. 405, 96 N. E. 298, 299; *Marvin v. Ledwith,* 111 Ill. 144, 149; *Blatchford v. Newberry,* 99 Ill. 11, 62; *Isenhart v. Brown,* 1 Edw. Ch. 411, 413; *Carper v. Crowl,* 149 Ill. 465, 469, 36 N. E. 1040; 2 Scribner, Dower (2d ed.) 527; 2 Williams, Executors, 669.

William W. Wight, guardian *ad litem* for the minor residuary legatees, respondents, contending that the part renounced by the widow was not thereby taken out of the trust, but remained therein to be sequestered for the benefit of the disappointed legatees, cited among other authorities: 2 Story, Eq. Jur. (13th ed.) 423; 1 Woerner, Am. Law of Administration (2d ed.) p. 273; *Jennings v. Jennings,* 21 Ohio St. 56; *Dean v. Hart,* 62 Ala. 308; *McReynolds v. Counts,* 9 Gratt. (Va.) 242; *Levengood's Estate,* 38 Pa. Super. Ct. 491; *Evans's Estate,* 150 Pa. St. 212, 24 Atl. 642; *Maskell v. Goodall,* 2 Disn. 282; *Sarles v. Sarles,* 19 Abb. N. C. 322; *Russell v. Wright,* 133 Wis. 445, 113 N. W. 644; *Jones v. Knappen,* 63 Vt. 391, 22 Atl. 630; *Latta v. Brown,* 96 Tenn. 343, 34 S. W. 417; *Plympton v. Plympton,* 6 Allen, 178; *Hinkley v. House of Refuge,* 40 Md. 461; *Hoskins v. Hoskins,* 43 Iowa, 452; *Hauk v. McComas,* 98 Ind. 460; *McCallister v. Brand's Heirs,* 11 B. Mon. (Ky.) 370; *Roe's Ex'rs v. Roe,* 21 N. J. Eq. 253.

SIEBECKER, J. The controversy presents the question: What disposition was made by the testator of the thirty per cent. of the residue of the testator's estate which by the provisions of the will he bequeathed to the widow? The widow renounced this bequest by electing to take the provision made for her by law. The appellants contend that the effect of the

widow's election is that the portion of the estate so bequeathed to her becomes undisposed-of property, and passes to the testator's adopted daughter as his heir at law; while the respondents assert that the provisions of the will show that the testator intended this portion of his estate to be a part of the residuum specified in the will, and that it passes to those persons whom he designated as residuary legatees. The trial court held that the portion of the residue bequeathed to the widow remained part of the residuum and passed to the residuary legatees after the widow dropped out of this class. The controlling inquiry is: What disposition did the testator make of this portion of his estate? It is urged that by his will he specifically limited this bequest to his widow and that by her renunciation thereof there is a failure of disposition of it, and hence that it devolves as intestate property. If the testator intended that the residuary legatees, other than his widow, should receive the residuum, including the part she was to take under the will, that solves the inquiry and fixes the disposition thereof. We are of opinion that it is manifest from the provisions of the will that the testator intended that the residue of his estate, as fixed by his will, should go to the residuary legatees generally, without restriction of a particular part thereof to each one. Approaching the situation as the testator did, it is clear that he considered the persons who were to be the objects of his bounty under three classes, namely, those upon whom he intended to bestow specific bequests, then his widow, and finally the class which was to receive the residuum; and he parceled out his estate with this in view. It also appears that it was his definite purpose and object that no part of his estate, except a small portion of the residuum, should go to his adopted daughter, and that no part of his estate should devolve as intestate estate. The scheme of intrusting and bequeathing the residue of the estate to the three selected trustees, who were to hold the property for ten years and then distribute it as directed, is per-

suasive evidence of his intent that the residuum was to belong generally to those whom he selected as residuary legatees, and to that end he invested the trustees with extensive powers of management and control over the same, with directions to hold the accumulations thereof for ten years, after converting all of the residue into money, "for the purpose of . . . distributing the residue as hereinafter provided," among his beneficiaries. It is significant that in dealing with the residue the testator treated it throughout as a separate quantum of his estate, which should be held for a period of years for the purpose of distributing it among the residuary legatees, and that this scheme appealed to him as the best legal means for gathering and holding this residuary estate for those whom he designated as its beneficiaries. The fact that the widow renounced the benefits he conferred upon her as a residuary legatee does not disturb the will of Mr. Reynolds except in the particular provision intended for her, and cannot operate to defeat the intended disposition of his other property, unless her renunciation necessarily interferes therewith. Appellants lay much stress on the case of *In re Bradley's Will,* 123 Wis. 186, 101 N. W. 393, as applicable to and controlling the instant case. The principal question there considered was how to ascertain the residue of the testator's estate; his wife, to whom was bequeathed a part thereof, having predeceased him, and his second wife, who survived, having demanded the one-third of his estate to which she was entitled under the law. This court there held that, under such circumstances and under the provisions of the will, the testator used the word "residue" in the sense in which it is commonly employed, and that the "residue" of the testator's estate, under these conditions, consisted of the part that remained of the general estate after deducting the debts and the widow's legal share. This rule for ascertaining the "residue" is to be applied here, but the case in no way aids us to ascertain what disposition Mr. Reynolds made of the residue

of his estate by the provisions of his will. That intention must be gathered from the four corners of the instrument under the facts and circumstances surrounding him. We are persuaded that he intended that the whole of the residuum of his estate should go to the residuary legatees, and that no part thereof should under any circumstances become intestate property. While the widow's renunciation may affect the quantity of the residue, it cannot affect his disposition thereof, and it must be held by the trustees for the purpose of distributing the same among the beneficiaries he designated, that is, the residuary legatees after the widow dropped out.

In view of this disposition of the property under the will, it must follow that the stipulation of the parties for a distribution of the estate contrary thereto must be disregarded, and that the executors and trustees must carry out and execute the will in accordance with its terms. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice: Cowie v. Strohmeyer,* 150 Wis. 401, 136 N. W. 956.

The trial court held as a conclusion of law that the residuary legatees under the will did not take a vested estate in the property constituting the residue and held in trust for their benefit, and that their interests would not become vested until the period of the trust expired and the time for distribution arrived. The will gives the property to the residuary legatees, subject to the trust for the period of ten years, free from conditions or contingencies which might defeat the gift or terminate their right thereto when the trust expired. As declared in *Ohse v. Miller,* 137 Wis. 474, 119 N. W. 93:

"The gift will be held to vest, if such appears to have been the testator's intention, even though it be expressed in a mere direction to pay. . . . The real inquiry is whether the element of time is annexed to the gift itself as a condition precedent or merely to the payment of it."

It is obvious from the context of the will that the testator intended by the words used to make a present grant and to

postpone the distribution thereof to the time when the trust expires. *Williams v. Williams,* 135 Wis. 60, 115 N. W. 342; *Will of Prasser,* 140 Wis. 92, 121 N. W. 643.

There is no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

A motion for a judgment for costs, including a reasonable sum for attorneys' fees, to be paid out of the estate, in favor of the *Milwaukee Protestant Home for the Aged* and against the executors, was denied January 28, 1913.

AMERICAN FOOD PRODUCTS COMPANY, Respondent, vs. AMERICAN MILLING COMPANY, imp., Appellant.

November 21—December 10, 1912.

Discovery: Examination of adverse party: Affidavit: Requisites and sufficiency: Discretion: Notice: Irregularities: Foreign corporations: Right to sue in this state: Jurisdiction: Service of process on officer in state: Appeal: Review.

1. Where plaintiff seeks to examine the defendant under sec. 4096, Stats., before issue joined, if his affidavit shows affirmatively that he has no cause of action the examination will be denied; but the affidavit need not state facts sufficient to constitute a cause of action, nor is it even necessary that plaintiff should know that a cause of action exists. All that the statute requires is that the general nature and object of the action be stated, and that a discovery is sought in order to enable the party applying for it to plead.
2. The right of foreign corporations to sue in the courts of this state rests upon comity, and in the absence of legislative prohibition they may maintain such actions in certain cases without having complied with sec. 1770*b*, Stats.
3. A contract between foreign corporations to exchange property of one or more for stock in another, which is neither made nor to be performed in this state and does not relate to property within the state, is not affected by sec. 1770*b*, Stats., either as

to its validity or as to the right of one of such corporations to maintain an action thereon in the courts of this state.

4. In such a case it is immaterial to plaintiff's right to examine an officer of the defendant corporation before issue joined, whether an action for specific performance can or cannot be maintained here upon contract to convey land in another state, where the affidavit states that the action is brought to enforce the promises and undertakings of defendant or, if specific performance be impossible, to recover damages.

5. Where the president of defendant corporation was named in the summons as an individual defendant, and a notice was given for an examination under sec. 4096, Stats., describing him as "one of the above named defendants," while the subpœna was directed to him "individually and as an officer of the corporations named," etc., service of such papers upon him was sufficient to authorize his examination as an officer of the corporation, and the irregularity, if any, should be disregarded.

6. Under subd. 13, sec. 2637, Stats. (1898), when a foreign corporation has property within this state, service of process may be made upon it by service upon an officer thereof, being within the state, and it is immaterial whether at the time of service such officer is in the state on business of the company or not.

7. The same rule applies to service of a notice of examination under sec. 4096, Stats., to enable the plaintiff to plead.

8. Where the matters upon which discovery is sought to enable a party to plead are obviously within the knowledge of the party applying for the examination it will be denied; but where the facts sought are not obviously within the knowledge of the party, and the affidavit is in compliance with the statute, examination should be permitted.

9. The affidavit in this case, showing among other things that the cause of action is based on a contract of subscription to the capital stock of plaintiff; that plaintiff had tendered performance, but defendant had failed to perform; that the books and records in defendant's possession show the transactions and proceedings with reference to said contract; and that discovery thereof is necessary and is sought in order to enable the plaintiff to plead,—is *held* sufficient to justify an order for the examination of the president of defendant, a foreign corporation, upon whom service had been made.

10. The examination of a party under sec. 4096, Stats., is at all times under the supervision of the trial court, and the discretion of that court respecting such examination will not be interfered with except in cases of clear abuse.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This is an appeal from an order for the examination under sec. 4096, Stats., before issue joined, of one A. G. Winter, as an officer of the defendant *American Milling Company,* a consolidated corporation. The affidavit for examination was made by one W. A. Hayes, in which he alleges that he is one of the attorneys for the plaintiff corporation and makes the affidavit on its behalf; that the general nature and object of this action is to enforce a certain agreement made by the defendants Marsden Company and American Milling Company with said plaintiff for a subscription to $1,251,000 worth of the total capitalization of $2,500,000 of the plaintiff corporation, and conveyance to said plaintiff of certain properties of said defendant corporations; that discovery is sought to enable the plaintiff to frame its complaint herein; that, as affiant is informed and verily believes, the plaintiff corporation was duly organized and exists under the laws of the territory of New Mexico and was organized for the purpose, among other things, of the general manufacture and sale of food products, dairy feed, etc., the purchasing and owning of real estate and other property, and the purchasing and holding of stock in other corporations engaged in similar enterprises; that the defendant Marsden Company is a corporation duly organized and existing under the laws of the state of New Jersey, so this affiant is informed and verily believes, with its principal office in the city of Philadelphia, Pennsylvania, and was until a short time ago, as deponent is informed and believes, a so-called holding corporation, having and holding a large proportion, if not all, of the stock of the defendant corporation American Milling Company; that the defendant corporation American Milling Company is a corporation duly organized and existing under the laws of the state of New Jersey, engaged in a general manufacture of

dairy feeds, and owning and holding large and valuable plants to manufacture the same at Peoria, Illinois, Lindon, Indiana, Owensboro, Kentucky, and Superior, Wisconsin; that at all times hereinafter mentioned the defendant A. G. Winter was one of the principal officers of the said defendant corporations, Marsden Company and American Milling Company, and, as this affiant is informed and believes, is now the president of said consolidated *American Milling Company,* defendant herein.

Deponent further alleges upon information and belief that sometime in December, 1908, or January or February, 1909, certain proceedings were had by the defendant corporations Marsden Company and American Milling Company, whereby it was attempted to consolidate such corporations and merge the same into the defendant *American Milling Company,* and said *American Milling Company* assumed all debts and liabilities of said defendants Marsden Company and American Milling Company; that sometime prior to December 14, 1905, negotiations were had between plaintiff and the defendant corporations for the subscription to a certain amount of the capital stock of the plaintiff corporation by said defendant corporations, and pursuant to said negotiations, on December 14, 1905, as deponent is informed and believes, a resolution was duly and regularly adopted by the defendant corporation Marsden Company, whereby it was agreed that the said Marsden Company should take stock in the plaintiff corporation to the amount of $1,251,000 of its total capitalization of $2,500,000, and in consideration for the issue of such stock by plaintiff to said Marsden Company there should be turned over and conveyed to plaintiff at the appraised value the plants then owned and occupied by the defendant American Milling Company at Peoria, Illinois, Lindon, Indiana, and Owensboro, Kentucky, together with the merchandise then on hand, accounts outstanding, real estates, etc., and that it was further agreed that certain properties should

be acquired by said defendants, or either of them, other than that held by them, and which said new properties, when so purchased and acquired, should also be conveyed to plaintiff in partial payment for the aforesaid subscription, and that the balance between such appraised value of all such property and said $1,251,000 should be paid in cash.

Deponent further alleges upon information and belief that said agreement for the subscription by said defendant Marsden Company was duly accepted by the plaintiff corporation, and thereafter stock for such amount, to wit, $1,251,000, was duly tendered to said Marsden Company, and proper offers and demand made for the compliance by said defendant Marsden Company of its part of said subscription agreement, but that said defendant corporations and each of them have evaded and refused to comply with all such demands and requests; that all of the books and records of said defendant corporations are in their possession and under their control and not in the possession and control of plaintiff, and that such books and records disclose, as deponent verily believes, the transaction of said corporations with reference to said proposed subscription, and the action, if any, taken by the said corporations subsequent to December 14, 1905, with reference to said subscription and agreement.

Deponent further alleges upon information and belief that subsequent to December, 1905, certain other properties have been acquired by said defendants, and that the same should be conveyed and assigned to the plaintiff, pursuant to the agreement aforesaid.

Deponent further alleges that this plaintiff has no adequate remedy at law, and that the points upon which discovery is sought are as follows:

First. The minutes of the meetings of the defendant corporations from on or about December 14, 1905, and thereafter which refer in any wise to any proceedings by either of said corporations with reference to the subscription to the

capital stock of the plaintiff by the said defendants, or either of them, or any proceedings with reference to the same, and information as to who was present at any of such meetings and what proceedings were had and what record made thereof, and, if no record was made of such proceedings, what discussions were had, motions made or presented with reference to said subject matter at any of such meetings, and also of all proceedings as to the alleged merger of the defendant corporations, the consideration thereof, and as to the assumption by said alleged merger corporation of all debts and liabilities of said defendant corporation.

Second. The description and value, so far as ascertainable, of the property held by the defendant corporations, or either of them, in December, 1905, at the time of the aforesaid stock subscription, whether held directly by either of them or in trust for them or by any corporation of which the defendant corporations, or either of them, held the stock.

Third. What has been done with such property since then, what conveyances, if any, of the same and to whom and for what consideration and under what arrangement.

Fourth. What property in connection with the business of the defendant corporations has been purchased by them, or either of them, directly or indirectly, since December, 1905.

Fifth. What agreement or options, if any, for the purchase of additional property have been obtained or entered into by the defendant corporations, or either of them, directly or indirectly, for the purchase of additional property since December, 1905.

Sixth. Any and all correspondence, records, documents, papers, contracts, or agreements of the defendant corporations, or either of them, or of any one for them or on their behalf, either directly or indirectly, that in any manner refer to the aforesaid subscription agreement and negotiations leading up to the same, or that in any wise refer to said matter since December, 1905.

Seventh. Any and all correspondence, records, documents, papers, contracts, or agreements of the defendant corporations, or either of them, or of any one for them or in their behalf, either directly or indirectly, that in any wise refer to the purchase by the defendants, or either of them, directly or indirectly, of any and all properties or options for purchase of property or agreements to purchase since December, 1905.

Eighth. Any and all facts or circumstances that may necessarily or properly be connected with any of the above and foregoing points.

The above affidavit and notice of examination, together with the summons and subpœna, were served upon the defendant A. G. Winter. The notice was as follows:

"Notice of Examination under 4096.

"(Title omitted.)

"You will please take notice that A. G. Winter, one of the above named defendants in the above entitled action, will be examined otherwise than as a witness on a trial, and his deposition taken at the instance of the adverse party, to wit, the plaintiff herein, by and before Adolph Kanneberg, a court commissioner in and for Milwaukee county, in said state, at his office, 415 Camp Bldg., 82 Wisconsin street, in the city of Milwaukee, in said county, on the 3d day of June, A. D. 1910, at 9 o'clock in the forenoon of that day.

"Dated Milwaukee, Wis., May 26, A. D. 1910.

"W. A. HAYES,
"Attorney for Plaintiff."

The subpœna was addressed as follows:

"To the defendants above named:

"Subpœna under 4096.

"The State of Wisconsin, }
Circuit Court, Milwaukee County. } ss.

"The State of Wisconsin, to A. G. Winter, individually and also as officer of the corporations named as defendants herein."

The return of the officer shows service of the summons on the 27th day of May, 1910, in the city of Milwaukee, upon each of the defendants, namely, Marsden Company, a corporation, American Milling Company, a corporation, *American Milling Company,* a consolidated corporation, and A. G. Winter; and at the same time and place that he served the summons the officer further returned that he served upon each of the defendants the notice of examination of Winter before Adolph Kanneberg, a court commissioner in and for Milwaukee county, at his office on the 3d day of June, 1910, at 9 o'clock in the forenoon; also that he served the subpœna and tendered the legal fees for the attendance of said Winter at the time and place named in the subpœna; also at the same time and place and in the same manner he served the affidavit for examination.

Afterwards a motion was made by the *American Milling Company* on order to show cause, based upon petition of the *American Milling Company,* defendant, the affidavit of defendant Winter, and certificate of the secretary of the state of Wisconsin, praying that the court adjudge that the plaintiff is not entitled to an examination of said Winter, and that the affidavit, notice, and proceeding on the proposed examination and discovery be vacated and denied and the subpœna suppressed and the action be dismissed. The prayer of the petitioner was denied.

The defendant *American Milling Company* further moved on the papers and records in the case to limit the subject of examination of the said Winter in case the prayer of the petitioner be denied.

The order of the court, omitting the formal parts, is as follows:

"It is ordered:

"1. That the said petition of the defendant be and the same hereby is in all things denied, and the plaintiff is

hereby granted leave to pursue said examination either in behalf of an action at law or a suit in equity as it may elect, but said examination shall be limited to matters material to the framing of plaintiff's complaint, and the court reserves the right to restrict said examination when not so limited. The said examination shall commence at 11 o'clock on the 29th day of April, 1912, before the officer and at the place named in the original notice and subpœna issued herein.

"2. That the plaintiff recover ten dollars ($10), costs of this motion, the same to be paid within twenty days after service of a copy of this order upon defendants' attorneys.

"Dated this 29th day of March, 1912."

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove.* The affidavit was insufficient and showed the examination was not necessary for pleading. *Badger B. Mfg. Co. v. Daly,* 137 Wis. 601, 119 N. W. 328; *Ellinger v. Equitable L. A. Soc.* 138 Wis. 390, 120 N. W. 235. It showed, further, that there was no cause of action maintainable in Wisconsin and that plaintiff had no capacity to sue. *Wyman v. Kimberly-Clark Co.* 93 Wis. 554, 67 N. W. 932; *Pozorski v. Gold Range C. Corp.* 142 Wis. 595, 126 N. W. 24; *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080; *Wicks v. Caruthers,* 13 Lea, 353; *Burrall v. Eames,* 5 Wis. 260; *Bettys v. M. & St. P. R. Co.* 37 Wis. 323; *Disconto Gesellschaft v. Umbreit,* 127 Wis. 651, 106 N. W. 821; *Paul v. Virginia,* 8 Wall. 177; *Madison v. Madison G. & E. L. Co.* 129 Wis. 249, 108 N. W. 65; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900. Defendant was never legally served with notice. *Helms v. Chadbourne,* 45 Wis. 60; *Watertown v. Robinson,* 69 Wis. 230, 34 N. W. 139; *Rape v. Heaton,* 9 Wis. 328; *St. Clair v. Cox,* 106 U. S. 350, 1 Sup. Ct. 354; *Goldey v. Morning News,* 156 U. S. 518, 15 Sup. Ct. 559; *Conley v. Mathieson A. Works,* 190 U. S. 406, 23 Sup. Ct. 728; *Geer v. Mathieson A. Works,* 190 U. S. 428, 23 Sup. Ct. 807;

Pennsylvania L. M. Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483; *Remington v. Cent. Pac. R. Co.* 198 U. S. 95, 25 Sup. Ct. 577.

Arthur H. Bartelt, for the respondent, cited *Gratz v. Parker,* 137 Wis. 104, 106, 118 N. W. 637; *Schmidt v. Menasha W. W. Co.* 92 Wis. 529, 66 N. W. 695; *Chickering-Chase Bros. Co. v. White,* 127 Wis. 89, 106 N. W. 797; *Heckendorn v. Romadka,* 138 Wis. 416, 120 N. W. 257; *Charter Oak L. Ins. Co. v. Sawyer,* 44 Wis. 387; *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940; *Catlin & P. Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818; and other cases.

KERWIN, J. This case was here before on appeal by Winter from a former order dismissing a petition filed by him praying that the examination be suppressed and dismissed. The order from which Winter appealed dismissed the action as to him and it was held that he was not aggrieved by the balance of the order. *American F. P. Co. v. Winter,* 147 Wis. 464, 133 N. W. 595.

The appellant now makes several contentions for reversal which we shall consider in the order made.

1. It is first insisted that the affidavit for examination is not sufficient under sec. 4096, Stats.; that the examination should be denied and the action dismissed; and further, that the examination should have been denied for the reason that it appears that the plaintiff has all the information required in order to plead. The statute provides that, if the examination shall be taken before issue joined, the notice of taking the same shall be accompanied by an affidavit stating the general nature and object of the action, that discovery is sought to enable the party to plead and the points on which discovery is desired, and such examination shall be limited to the discovery of facts relevant to such points, unless the court or presiding judge shall before the examination is begun, by order, further limit the subjects to which it shall extend.

The statute extends the right of examination to the president and other officers named of a foreign corporation.

It is argued by appellant that when from the statement made by a party of the nature and object of his action in order to enable him to plead it appears that he has no cause of action, the examination will be denied under the doctrine laid down in *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900; *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65; *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066. The rule of these cases may be conceded to be good law, but we think it does not apply here, because it does not appear from the statement made in the affidavit of respondent of the nature and object of the action that no cause of action exists, but on the contrary we think the affidavit is sufficient.

We have set out in the statement of the case, substantially, the affidavit upon which discovery is sought in order to enable the respondent to plead, from which it appears that the cause of action is based upon a contract of subscription to the capital stock of the respondent, tender of performance by respondent, and failure to perform by appellant. Upon the face of the affidavit it does not appear that the respondent has no cause of action, unless no power to make the contract existed.

Under this head it is argued that the action cannot be maintained in this state, because respondent has not complied with sec. 1770*b*, Stats., and is not authorized to transact business nor to acquire property within this state. That the privilege accorded to foreign corporations to sue in this state rests on comity and therefore is subject to such terms as the state may impose is well established under the rule laid down in *Wyman v. Kimberly-Clark Co.* 93 Wis. 554, 67 N. W. 932; *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940; *Pozorski v. Gold Range C. Corp.* 142 Wis. 595, 126 N. W. 24; and *Presbyterian M. Fund v. Thomas,* 126 Wis. 281, 105 N. W.

801. An examination of the foregoing cases will show that the actions were in contravention of the statutes and public policy of the state, therefore held not maintainable. In the absence of legislative prohibition, foreign corporations may maintain actions in the courts of this state in certain cases without compliance with sec. 1770*b*, Stats. *Charter Oak L. Ins. Co. v. Sawyer,* 44 Wis. 387; *Chicago T. & T. Co. v. Bashford, supra.* In so far as the record now before us shows, the cause of action sued upon does not come within the prohibition of sec. 1770*b*, Stats.

Subd. 10, sec. 1770*b*, Stats.: ". . . Every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

Subd. 2 of sec. 1770*b* prohibits the transaction of business or the acquiring, holding, or disposing of any property in the state by certain corporations until the statute respecting filing with the secretary of state of a copy of its charter, articles of association or incorporation, and all amendments thereto, have been complied with. Conceding for the present, as the certificate of the secretary of state tends to show, that the respondent failed to file a copy of its charter or articles of incorporation as required by the statute, we find no objection to the maintenance of the present action. Subd. 10, sec. 1770*b*, Stats.; *Catlin & P. Co. v. Schuppert,* 130 Wis. 642, 110 N. W. 818; *Chickering-Chase Bros. Co. v. White,* 127 Wis. 83, 106 N. W. 797. There is nothing in the record showing that the contract was made or to be performed in this state, or that it relates to property within this state; and further it appears that performance had been tendered on the part of the respondent and the action brought for nonperformance by appellant.

Counsel contends that by the present action respondent is

either seeking to obtain conveyance to itself of property which the statute forbids it to acquire or hold, or for specific performance of an agreement to convey land situated outside of Wisconsin, which the courts of this state have no jurisdiction of. The affidavit does not support counsel's contention. True, it is alleged that appellant has property in Wisconsin, Illinois, Indiana, and Kentucky. But the real estate alleged to have been exchanged for respondent's stock is stated in the affidavit to be situate in Peoria, Illinois, Lindon, Indiana, and Owensboro, Kentucky. Whether an action could be maintained in this state to enforce specific performance of a contract to convey land in another state, see *Dickson v. Loehr,* 126 Wis. 641, 106 N. W. 793. But it is immaterial whether specific performance can be maintained or not. It is sufficient if some kind of an action can be maintained. The affidavit says the action is brought to enforce the promises and undertakings, or, if specific performance be impossible, to recover damages. Obviously, respondent has not yet made its election as to which remedy it will pursue.

It is further argued by counsel that there was no service of the notice of examination upon Winter as officer of the defendant. The objection is more technical than substantial. The return of the officer making the service shows a good service upon Winter as president of defendant corporations. It is perfectly clear that even if there was any irregularity in service, which does not appear, it was not prejudicial, therefore should be disregarded. *Harvey v. C. & N. W. R. Co.* 148 Wis. 391, 134 N. W. 839.

It is further urged that the service upon Winter as president was not a good service on defendant, a foreign corporation, since it is claimed he was not in the state as officer or agent of defendant corporation. As to whether Winter was in the state as officer of the corporation is a matter of dispute. But we regard it wholly immaterial whether he was at the time of service in the state on business of defendant corpora-

tion or not. It appears from the record that the defendant had property in this state and that Winter was its president at the time of service and within the state. That is sufficient to make a valid service upon defendant. Subd. 13, sec. 2637, Stats. (1898). This statute provides that service may be made upon such a foreign corporation by service upon an officer thereof, being within the state, when the corporation has property within the state or the cause of action arose therein.

It is strenuously argued by counsel for appellant that the affidavit for discovery shows that the respondent had all the information necessary in order to plead. This contention is not based solely upon the original affidavit for discovery made by Hayes, but also upon a subsequent affidavit made by Winter, president of defendant, and petition of defendant to dismiss, which affidavit and petition upon information and belief set forth knowledge on the part of one Alfred von Cotzhausen of Milwaukee, who, it is alleged, is president of respondent, if respondent has any president, and also some other facts which appear from the whole record and papers used on the motion to dismiss and suppress the examination in connection with the original affidavit for discovery. It also appears from the record that Mr. Hayes made a second affidavit tending to meet the allegations made in the Winter affidavit and petition of appellant. But whether these subsequent affidavits respecting the right of the respondent to the examination are material or not we need not consider, because they do not substantially change the situation as shown by the original affidavit of Hayes. The affidavit for discovery set out in the statement of facts, we think, shows sufficiently that the respondent was entitled to discovery upon the points therein specified. All that the statute, sec. 4096, requires is that the general nature and object of the action be stated, and that discovery is sought in order to enable the party applying for it to plead. The statute does not require that sufficient facts be stated to constitute a cause of action, nor is it even neces-

sary that the respondent should know that a cause of action exists. *Gratz v. Parker,* 137 Wis. 104, 106, 118 N. W. 637. Of course if the affidavit affirmatively shows that no cause of action exists, the examination will be denied. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65; *State v. Milwaukee E. R. & L. Co.* 136 Wis. 179, 116 N. W. 900.

It is also true that when the matters upon which discovery is sought are obviously within the knowledge of the party applying for the examination, it will be denied. *Badger B. Mfg. Co. v. Daly,* 137 Wis. 601, 119 N. W. 328. But such is not the case here. It cannot be said from the affidavit for discovery or from the whole record that the court below was wrong in refusing to suppress the examination. Ordinarily where it appears that a cause of action exists in favor of the party applying for discovery, and the facts sought to be discovered are not obviously within the knowledge of such party, and the affidavit is in compliance with the statute, the right to examination should not be denied, and the discretion of the trial court respecting such examination will not be interfered with, except in cases of clear abuse. *Badger B. Mfg. Co. v. Daly, supra; Ellinger v. Equitable L. A. Soc.* 138 Wis. 390, 120 N. W. 235.

The court below was warranted in finding upon the records presented that the minutes, proceedings, and other documents relating to the contract between the appellant and respondent were within the custody of Winter, president of the defendant; also that the information asked for was necessary on the part of the respondent to enable it to plead, namely, the liability of the *American Milling Company,* a consolidated corporation, transactions between the different corporations, defendants, respecting their liability, and the property acquired by them in pursuance of the contract, the nature of the respondent's relief, and upon other points specified in the affidavit for discovery in so far as the same shall be relevant to the controversy. The examination is at all times under the

supervision of the trial court and the witness cannot be compelled to answer questions not relevant to the controversy. We find no error in the refusal of the court to dismiss the action or suppress the examination. As before observed, the matter of examination under sec. 4096, Stats., is very largely in the discretion of the trial court and the order of the court in proceedings under this statute can only be disturbed for clear abuse of discretion.

By the Court.—The order appealed from is affirmed.

GUSE, Respondent, vs. POWER & MINING MACHINERY COMPANY, Appellant.

November 21—December 10, 1912.

Master and servant: Defective appliances: Personal injury: Negligence: Proximate cause: Concurrent causes: Evidence: Questions for jury: Adverse witness: Re-examination: Discretion: Appeal: Harmless errors: Presumed findings: Special verdict: Instructions to jury: Arguments of counsel.

1. In an action for personal injuries caused by the breaking of an S-hook in raising a heavy sheet of metal, the testimony being conflicting as to whether the prior breaking of similar hooks had been under the same or under different circumstances and as to whether the hook in question was in its proper place at the time of the accident, these were questions for the jury.
2. Under such circumstances the breaking of the hook was a fact from which the jury might infer that it was defective or insufficient.
3. Standing alone, the breaking of the hook would not raise a presumption of negligence; but when this was supplemented by evidence that hooks of the same kind and make had frequently broken or bent under similar weights, that defendant's employees had been subjected to such danger for a considerable length of time, that such weakness in the hooks in all probability came to the knowledge of the defendant's superintendent, that the hooks were improperly made, and that there were indications of crystallization of the steel at the place of fracture,

there was sufficient evidence to go to the jury on the question whether defendant was negligent in furnishing such defective appliance.

4. Defendant not having requested the submission in the special verdict of a question covering its negligence in furnishing such defective hook, that question must be considered settled in the affirmative by the judgment in plaintiff's favor.

5. There being evidence of defendant's negligence sufficient to support a verdict for plaintiff without considering the question of the incompetence of defendant's servant who made the hook in question, errors assigned on the latter branch of the case may be disregarded.

6. In an action for injuries caused by the breaking of an S-hook used in raising a heavy sheet of metal, evidence as to the tensile strength of the iron in such hook is of little value, because where the force is applied in a different manner and direction from that employed in determining the tensile strength, the tenacity varies without any consistent or constant proportion to such tensile strength.

7. Where an employee of a defendant corporation is called and examined by plaintiff as an adverse witness on the trial, under sec. 4068, Stats. (Laws of 1911, ch. 291), the defendant has a right to re-examine such witness immediately thereafter as to all matters tending to explain or qualify the testimony already given, or may ask the witness questions proper for the purpose of impeachment, upon a statement that it does not thereafter intend to make the witness its witness. *O'Day v. Meyers*, 147 Wis. 549, modified.

8. The scope of such re-examination is largely in the discretion of the trial judge, but it should not be extended so far as to cover new matter constituting part of the defense.

9. The erroneous denial of the right of re-examination of an employee of a party called and examined as an adverse witness under sec. 4068, Stats., is not ground for reversal where it is apparent from the record that such ruling could have had little, if any, effect on the result.

10. A judgment will not be reversed for the erroneous admission of irrelevant evidence, or even of incompetent evidence, unless it affirmatively appears that the appellant has been prejudiced thereby.

11. A judgment in an action founded on negligence may properly be sustained upon a verdict finding two proximate causes. Both will be treated as proximate and concurrent unless the evidence forbids; and if the evidence shows that one is proximate and the other remote and indirect or even no cause at all, the true

proximate cause will support the judgment and the other finding be rejected as surplusage.

12. If the evidence shows that neither of the causes found is the proximate cause, the judgment cannot stand except in a case in which the uncontradicted evidence shows the true proximate cause, or a case in which the matter was not brought to the attention of the trial court and in which, in support of the judgment, a finding of proximate cause will be presumed to have been made by the court, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346).

13. Where, in connection with a question of the special verdict as to whether a certain appliance was safe, the court charged that to hold it defective the jury must find not only the defect but that the employer had reasonable ground to apprehend that an injury might result therefrom to an employee, the error was not prejudicial to defendant, because the charge was so inapplicable to the narrow question submitted that it could not have affected the answer, and because in any event it was favorable to defendant.

[14. Whether the meaning and scope of such question could properly be enlarged by instruction so as to cover both the physical condition of the appliance and the negligence of the defendant, not determined.]

15. For counsel, in arguing to the jury upon a special verdict, to say they should or ought to answer the questions in a certain way, is not misconduct calling for a reversal.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Connell & Weidner,* attorneys, and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *W. L. Gold.*

TIMLIN, J. The complaint in this action contained numerous charges of negligence. Among them may be found averments which, under the liberal rule of pleading now existing, support the verdict. The verdict was as follows:

"(1) Was the 'S' hook which broke at the time of the injury to plaintiff, October 11, 1909, an unsafe appliance for the use and purpose to which it was put? *A.* Yes.

"(2) If you answer question 1 'Yes,' then answer: Ought the defendant in the exercise of ordinary care and prudence to have reasonably anticipated that some injury might probably result from the use of such hook? *A.* Yes.

"(3) If you answer 1 and 2 'Yes,' then answer: Was the use of such hook the proximate cause of plaintiff's injuries? *A.* Yes.

"(4) Was the breaking of such hook at the time of the injuries to plaintiff a pure accident? *A.* No.

"(5) Was William Bunty incompetent to make proper and suitable hooks for use in the manner in which the hook which broke was used at the time of the accident? *A.* Yes.

"(6) If you answer the fifth question 'Yes,' then answer: Did defendant know of such incompetence? *A.* Yes.

"(8) If you answer question 5 'Yes' and either 6 or 7 'Yes,' then answer: Was such incompetence of William Bunty the proximate cause of plaintiff's injuries? *A.* Yes.

"(9) Ought the plaintiff in the exercise of ordinary care to have anticipated that the use of such hook might probably result in an injury? *A.* No.

"(10) At what sum do you assess plaintiff's damages? *A.* $6,500."

Fifteen errors are assigned, ten of them relating to rulings on evidence, one to refusal to direct a verdict for defendant, one to misconduct of counsel in argument, one to the form of the special verdict, one to the instructions, and one to the denial of a motion for a new trial.

There is no controversy in the evidence with reference to the manner of plaintiff's injury or with reference to the direct physical cause of such injury. A large piece of sheet steel six feet in width by fourteen feet in length and weighing about 1,000 pounds, and perforated along the edges with bolt or rivet holes, was passed between rollers which changed it from a flat plane to the segment of a cylinder. This segment was removed from the place of this operation by that mechanical device known as a crane. Two appliances called S-hooks were hooked into a ring or rings suspended from the crane, and the lower end of each S-hook hooked into a rivet hole on

opposite sides of the segment, which was then lifted by the crane and carried to its place of destination. These S-hooks were so called because they had a crude resemblance to the letter S, in that the upper and lower hooks were bent in opposite directions. They were made out of soft, round rod steel five eighths of an inch in diameter, were heated and bent into this shape by Mr. Bunty, one of defendant's workmen, who was not a blacksmith and had little or no knowledge of the properties of iron or steel, and they were hooked into the curved sheet about to be lifted by the plaintiff and Mr. Bunty. After the curved sheet was raised and while it was suspended on these hooks one of the hooks broke and the sheet of iron fell on plaintiff, injuring him severely. The broken S-hook was in evidence, and there was testimony that at the point where it broke there was evidence of crystallization and that similar hooks had frequently either broken or bent in this and similar operations at defendant's factory while lifting similar weights. Ganon, who was defendant's superintendent at the time, says that the former breaking of the hooks was not under similar circumstances, but that they broke in turning sheets over before the bevel shears. This was, however, a question for the jury. The hooks were not inspected or tested in any way after being bent and before being used. There is evidence that the hooks were in their proper place at the time the hook broke, although there is considerable evidence from which the contrary inference might be drawn. This was also a question for the jury.

The breaking of the hook under these circumstances was a fact from which the jury might infer that the hook was defective or insufficient for the purpose for which it was used. *Klitzke v. Webb,* 120 Wis. 254, 97 N. W. 901; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434. Cases may be found which go further and hold that negligence may be presumed from such fact. But, standing alone, the breaking of the hook does not raise a presumption of negligence.

Spille v. Wis. B. & I. Co. 105 Wis. 340, 81 N. W. 397; *Hupfer v. Nat. D. Co.* 114 Wis. 279, 90 N. W. 191; *Tiborsky v. C., M. & St. P. R. Co.* 124 Wis. 243, 246, 102 N. W. 549.

When this evidence is supplemented by evidence that hooks of the same kind used in the same factory while lifting similar weights under the same or similar circumstances frequently gave way by bending or breaking, then from both there is evidence tending to establish negligence on the part of the master by continuing to use such insufficient and defective appliances. *Revolinski v. Adams C. Co.* 118 Wis. 324, 95 N. W. 122. We may therefore say that evidence that the hook was defective must be supplemented by evidence showing negligence on the part of the defendant. This latter may be supplied by evidence tending to show that such hooks broke frequently or bent under similar weights and that the employees had been subjected to such danger for a considerable length of time. *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 175, 114 N. W. 841. There was also evidence tending to show that such weakness in hooks of this size and make in all probability came to the knowledge of defendant's superintendent; that the hooks were improperly made; and that there were indications of crystallization of the steel at the place of fracture.

So, without going into the question of the incompetency of Bunty, there was evidence, proper to be submitted to the jury, on the question whether the hook was defective and also whether the defendant was negligent in supplying the plaintiff with this defective appliance. There was therefore no error in refusing to direct a verdict for defendant. There was no request by defendant to submit in the special verdict a question covering defendant's negligence in respect to furnishing the unsafe appliance, so that must be considered settled in the affirmative by the judgment. There being in the case sufficient to support the verdict without considering the question of the incompetence of Bunty or its effect in producing

the plaintiff's injuries, the errors assigned on this latter branch of the case must be disregarded as nonprejudicial.

Much testimony was given on both sides relative to the tensile strength of iron of the size and quality of the bar out of which these hooks were made. It is of little or no value in this case because not supplemented by testimony showing the relation between tensile strength and the strength of an open hook supporting the weight at the middle of the bend of the hook. Obviously the degree of curvature of the hook, the uniformity of the curve, and the distance of the rivet hole into which it was hooked from the nearest edge of the sheet attempted to be lifted, are factors in the result which affect and displace the factor of tensile strength to a greater or less degree. The greatest longitudinal stress a substance can bear without tearing asunder is the measure of its tensile strength or tenacity. Where the external force is applied in a different manner and direction the tenacity varies without any consistent or constant proportion to the tensile strength. There was no necessary or logical connection between the tensile strength of the iron out of which the hook was made and the carrying strength of the hook.

The trial court accepted too literally the language of the opinion of this court in *O'Day v. Meyers,* 147 Wis. 549, 133 N. W. 605, and when one of the employees of the defendant was called by the plaintiff as an adverse witness under the provisions of sec. 4068, Stats. (Laws of 1911, ch. 291), and examined by plaintiff's counsel, the court refused to permit any re-examination by defendant's counsel, apparently holding that if the latter desired the testimony of such witness he must call this witness as his own witness when his time came to put in evidence. This was too strict. Under such circumstances the defendant has a right to re-examine such witness immediately after the examination by plaintiff's counsel as to all matters tending to explain or qualify the testi-

mony already given, but not as to new matters not brought out by plaintiff's counsel and constituting part of the defendant's defense. So he may ask the witness questions proper for the purpose of impeachment upon a statement that he does not thereafter intend to make the witness his witness. The scope of such re-examination is largely in the discretion of the trial judge, but it should not be so extended in any case as to interject the defense into the plaintiff's case at this stage of the hearing. So far as *O'Day v. Meyers, supra,* may be understood to the contrary, it must be deemed modified by this decision. We are not, however, convinced that this erroneous ruling was prejudicial. Several witnesses of this kind were examined by plaintiff's counsel as adverse witnesses and immediately re-examined by defendant's counsel. The testimony given by the witness whose re-examination was excluded was cumulative and much weaker than that of some of the other witnesses who testified to the same point. When other like witnesses were called, re-examination by defendant's counsel was tacitly permitted, except in the case of the witness Kanter, where the learned circuit judge changed his ruling and permitted a re-examination. After this there was no attempt to recall for re-examination the witness in whose case the erroneous ruling was made. It would not do to reverse a judgment for a ruling which had so little apparent effect upon the result as that refusing to permit the re-examination of this adverse witness under the circumstances here shown. We perceive no error in the admission of evidence in the particulars in which error is assigned on this appeal, and it would be unprofitable to review the numerous assignments of error in detail. The rules relative to the admission of evidence are very liberal and enlightened, and judgments are not reversed for the erroneous admission of irrelevant evidence, or even of incompetent evidence, unless it affirmatively appears to this court that the appellant has been prejudiced thereby.

There was no error in submitting to the jury questions 1, 3, and 9 of the special verdict above quoted. The first and third were applicable to issuable facts in the case as made by the pleadings and evidence. The ninth was applicable to the defense of assumption of risk. There was no evidence of contributory negligence in the case as distinguished from assumption of risk. It is argued that the third and eighth findings of the verdict establish two proximate causes of the same injury, hence the verdict is defective. Many cases may be found in this court where judgments were upheld upon such verdicts. *Flynn v. Modern S. S. Co.* 149 Wis. 457, 134 N. W. 1044, and *Driscoll v. Allis-Chalmers Co.* 144 Wis. 451, 129 N. W. 401, are instances, but not the only instances. There are good reasons for these decisions. They relate to several causes created by the defaults or delinquencies of the same defendant. When prejudicial error must be affirmatively shown by the appellant, manifestly this court must, unless the evidence forbids it, treat these several causes as proximate and concurrent. If they are not concurrent, and the evidence shows that one is proximate and the other remote and indirect or even not a cause at all, the true proximate cause will support the judgment and the other finding becomes innocuous as surplusage. If the evidence shows that neither is the proximate cause, the judgment cannot stand except in those cases in which the uncontradicted evidence shows the true proximate cause or in those cases in which the matter was not brought to the attention of the circuit court and in which the finding of proximate cause will be presumed to have been made by the court in support of the judgment under sec. 2858*m*, Stats. (Laws of 1907, ch. 346).

Some portions of the charge excepted to are erroneous, as the following, given with reference to the first question of the special verdict:

"If such employer could reasonably apprehend that injury might result to an employee in the discharge of his ordinary

duties through any such of the conditions described in the evidence, then such condition or conditions are unsafe, as the word is used in this question."

The question related to the S-hook, not generally to "any such of the conditions described in the evidence." Condition or conditions described in the evidence might be unsafe without affecting the character of the hook as an unsafe appliance. Whether the employer in the exercise of ordinary care should have apprehended an injury to an employee affected, not the question of the safety of the appliance, but bore on the negligence of the defendant in using it, and the test of ordinary care is not whether one *could* apprehend an injury might result to some person, but whether an ordinarily prudent person under the same or similar circumstances, in the exercise of ordinary care, would have apprehended such injury. But this, we think, was not prejudicial because so inapplicable to the narrow question submitted to the jury by the first question of the verdict. It could not, we think, have affected the answer to that question. If it did, the error was against the plaintiff rather than against the defendant, because it advised the jury that in order to hold an appliance defective they must find not only the defect but that the employer had reasonable ground to apprehend that an injury might result therefrom to one of his employees.

It may be that the learned circuit judge intended that the first question should cover both the physical condition of the hook and the negligence of the defendant, and intended the word "unsafe" in the question to perform this double office. Whether he could legally do this we need not determine. To a certain extent the meaning and scope of a submitted question may be enlarged by the instructions, no doubt. Several cases in this court justify that conclusion. But it is doubtful whether that rule was ever applied to so extreme a case as this, where the first question is so narrow and restricted; and

the instruction would seek to import into it something apparently excluded by its terms.

We find no reversible error in the jury argument of counsel which defendant excepted to. His alleged transgression appears to consist of saying to the jury that they should or ought to answer the first three questions "Yes." We must presume that this was his view of their duty upon the evidence.

Other errors assigned have been considered and found not prejudicial.

By the Court.—Judgment affirmed.

ILLINOIS STEEL COMPANY, Respondent, vs. KOHNKE, imp., Appellant.

November 22—December 10, 1912.

Limitation of actions: Adverse possession: Ejectment against tenants: Effect as to landlord: Privity.

An action of ejectment brought by the true owner of land against tenants occupying the same operates to interrupt the running of the statute of limitations (in this case sec. 4211, Stats. 1898) in favor of the landlord, when he is in possession only through such tenants, although he is not a party to the suit. To that extent there is privity between tenant and landlord.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

On September 10, 1897, the plaintiff herein commenced an action against the defendants William Treu and wife to recover possession of certain property, the complaint alleging an estate in fee in the plaintiff and the unlawful withholding and occupancy thereof by the defendants. On September 23, 1897, the defendants William Treu and wife answered, alleging among other things that they were tenants of Andreas Kohnke, now deceased, and that he was a necessary and proper party defendant. On March 31, 1906, in accordance with a

previous order of the court making *Christina Kohnke,* wife of Andreas Kohnke, deceased, a party defendant, the plaintiff served an amended complaint on the defendants. On April 13, 1906, the defendant *Christina Kohnke* answered, setting up as a defense adverse possession by her grantors and predecessors for a period of more than twenty years immediately preceding the commencement of the action. On March 5, 1912, on leave of the court, the defendant *Christina Kohnke* served and filed an amended answer in which she alleged ten years' adverse occupancy under a written instrument, and as a new defense pleaded the ten-year statute of limitations applicable to the facts set forth.

On the trial the defendants introduced testimony to show that in the summer of 1891 Henry Troy built a house on the property in question and took up his residence there; that in 1892 he removed therefrom and rented the premises to one Charles Tessler, who continued to occupy the place; that in August, 1893, Troy and wife sold the property to Andreas Kohnke and that Tessler continued to occupy the same, paying rent thereafter to Kohnke until some time in 1896, at which time William Treu became a tenant of Kohnke and resided on the premises with his wife until shortly after the commencement of this action in 1897, and that thereafter the premises were occupied by various parties who were tenants of *Christina Kohnke.* At the close of the trial judgment was entered on a directed verdict in favor of the plaintiff, and from such judgment the defendant *Kohnke* appeals.

For the appellant there was a brief by *Fiebing & Killilea,* attorneys, and *Moritz Wittig* and *Henry J. Killilea,* of counsel, and oral argument by *Mr. Wittig.*

For the respondent there was a brief by *Theodore Kronshage, Jr.,* and *John H. Paul,* and oral argument by *Mr. Kronshage.*

BARNES, J. There was evidence tending to show that in 1893 one Henry Troy sold and conveyed the land in dispute

to Andreas Kohnke. Troy was apparently a squatter who had no title to the land which he sold. Kohnke died in 1905 and his widow succeeded to his rights in the property and is now one of the defendants in the action. The premises were occupied by the Kohnkes or their tenants from the time of the purchase until the action was tried in 1912. In 1897, when the action was commenced, William Treu and wife occupied the premises as tenants and the action was begun against them only. *Mrs. Kohnke* was not made a party defendant until 1906. She claims uninterrupted adverse possession from the time of the purchase in 1893 until she was made a defendant in 1906. She further claims that her husband took possession of the premises under claim of title, which claim was founded on a written instrument of conveyance, and that she now has good title by virtue of the ten-year statute of limitations (sec. 4211, Stats. 1898). Plaintiff traced the original title to itself.

As we view it the appeal presents but one question, and that is, Did the action which the plaintiff brought against the tenants in possession operate to interrupt the running of the ten-year statute of limitations in favor of the landlord? If this question should be answered in the affirmative the circuit court was right in directing a verdict, no matter what the grounds of its decision were.

It was the general rule at common law that in actions of ejectment the only necessary parties defendant were those in the actual occupancy of the premises over which the controversy arose. Under this rule it was held that the tenant in possession was a necessary party and that his landlord was not. 15 Cyc. 82–84; 10 Am. & Eng. Ency. of Law (2d ed.) 526; 7 Ency. Pl. & Pr. 301, 304. The existence of this rule of law was probably one of the reasons for the passage of sec. 18 of ch. 91, R. S. 1858, now sec. 2197 of our Statutes, by which it is made the duty of the tenant to notify the landlord of any proceeding brought for the recovery of the leased property or the possession thereof.

The statutory action of ejectment may be brought for the recovery of real property or for the recovery of the possession thereof. Sec. 3073, Stats. (1898).

If the premises are actually occupied, such actual occupant must be made a defendant. Sec. 3075, Stats. (1898). Treu and wife were the actual occupants of the premises in suit when the action was commenced and were necessary parties to the suit under this statute.

The plaintiff may join as defendants with the occupants those claiming title, but he is not obliged to do so if the party who makes the claim is not in possession and plaintiff seeks to recover possession only. Sec. 3076, Stats. (1898). Plaintiff is entitled to judgment if he succeeds in proving right of possession. Sec. 3079, Stats. (1898). These statutes, as well as secs. 3084 and 3086, Stats. (1898), clearly show that an action of ejectment may still be maintained when recovery of possession only is sought.

The appellant insists that there was no privity between the landlord and the tenant, and that neither the commencement of the action against the tenant nor the final judgment against him could affect the landlord who was not a party to the suit, and that the action was not commenced against *Mrs. Kohnke* until the summons was served on her in 1906. The following cases, among others, are cited and relied on to support her contention: *Levy v. Wilcox,* 96 Wis. 127, 132, 70 N. W. 1109; *Webster v. Pierce,* 108 Wis. 407, 418, 83 N. W. 938; *Wis. River L. Co. v. Paine L. Co.* 130 Wis. 393, 396, 397, 110 N. W. 220; *Kent v. Lasley,* 48 Wis. 257, 261, 4 N. W. 23; *Mariner v. Chamberlain,* 21 Wis. 251; *Smith v. Pretty,* 22 Wis. 655, 657; *Pewaukee v. Wis. Lakes I. & C. Co.* 110 Wis. 67, 85 N. W. 660; *Cypreanson v. Berge,* 112 Wis. 260, 87 N. W. 1081; and *Prahl v. Rogers,* 127 Wis. 353, 106 N. W. 287.

Without undertaking to discuss these cases in detail, it may be said that they are to the effect that a judgment in an action of ejectment against a tenant who is a party does not operate

to deprive a landlord who is not a party of either his title or of his future right of possession. They do not hold that the commencement of an action against the tenant does not interrupt the running of the statute of limitations in favor of the landlord. The authorities passing upon this question directly are not numerous. The Texas court has passed upon it and held that where one person was holding possession of lands by his tenant, that possession ceased to be peaceable when the tenant was sued for possession. Continuing, the court said:

"A claimant of land who brings his action against the party whom he finds in possession thereby stops the running of limitation in favor of that party's landlord. There is such privity between the tenant and landlord that, for the purpose of stopping limitation, the suit against the tenant is as effectual as if brought against the landlord also." *Read v. Allen,* 56 Tex. 180, 181.

Other cases to the same effect are *Read v. Allen,* 58 Tex. 380; *Allen v. Read,* 66 Tex. 13, 17 S. W. 115; *Stout v. Taul,* 71 Tex. 438, 9 S. W. 329; *Galbraith v. Howard,* 11 Tex. Civ. App. 230, 32 S. W. 803, 807.

A question closely akin to the one under discussion was before this court. The action was one to quiet title, plaintiff claiming to have been in possession of an interest in the premises by virtue of the occupancy of the land by a tenant. An action of ejectment had been commenced and prosecuted to judgment against the tenant by another claimant to the land, the landlord not being made a party to such suit. The plaintiff recovered judgment and the tenant against whom the action was brought then leased the premises from such plaintiff. The effect of the judgment was considered, and it was held that the possession was adversely and completely changed by virtue of the judgment, and that "the landlord is, so far, bound by the judgment, notwithstanding the want of notice, though he is not bound as to the title, or future right of possession. The tenant who neglects to give notice violates his

allegiance to his landlord, but that is only a matter between him and his landlord, and not one which can affect the party who has recovered possession from the tenant, except the recovery be collusive, or obtained by tampering with the tenant. It is the same as if the tenant had delivered over the possession wrongfully to another person. The landlord must bring an action of ejectment to recover it." *Stridde v. Saroni,* 21 Wis. 173, 178. The court holds in this case that the judgment operates to change the possession from the landlord to the plaintiff in the action, although it is not conclusive as to title or future right of possession. If such is the effect of a judgment where the tenant only is made a party defendant, it would seem to follow logically enough that the commencement of the action to recover possession would interrupt the running of the statute of limitations in favor of the landlord.

The general rule is of course well settled that judgments are binding only on parties and their privies. It is also laid down as a general proposition that there is no privity between landlord and tenant, because the landlord does not derive his title from, through, or under him. "No one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit." 1 Freeman, Judgments (4th ed.) § 162.

But it is not correct to say here that there was no privity between Andreas Kohnke and his tenants. The deed which he obtained to the premises apparently did not convey a shred of title. It only served to shorten the period of adverse possession that would be necessary to acquire good title in that manner. The only possession which Kohnke or his wife had up to the time the action was commenced against *Mrs. Kohnke* was the possession obtained by virtue of the occupancy of the premises by their tenants. It was solely through this possession that they could claim the benefit of the statute of limitations. The defendant *Kohnke* would not be entitled to the protection of such statute if an action were brought against

her or her husband during the ten-year period. The Kohnkes having possession through their tenants only, any challenge of the possession of the tenant was necessarily a challenge of the possession of the landlord.

Where the owner of a parcel of land finds some person in the actual occupancy thereof and commences an action to oust such occupant and recover possession, this is a pretty substantial assertion on the part of the owner of intention to claim what belongs to him. We have and can have no exact definition of what a disseised owner must do in the way of reclaiming his property in order to interrupt the running of the statute. It is said in *Ill. S. Co. v. Budzisz,* 115 Wis. 68, 87, 90 N. W. 1019:

"The most essential element in such a case is the '*animus clamandi,*' and that may be inferred from circumstances. It is not necessary that it should be made manifest by any formal declaration to anybody. The necessary purpose being clear, if the element of notoriety is sufficient to bring the situation home to the attention of the adverse occupant, if he is paying such heed to his possession as a person under the circumstances would ordinarily pay, that is sufficient."

Mere verbal denials of the right of the adverse occupant by the owner, or loose claims of title in himself, or ineffectual protests short of a disturbance of the rights of the adverse claimant in a legal sense and short of an assertion of right in himself, will not interrupt the running of the statute. 1 Cyc. 1069; *Ill. S. Co. v. Budzisz, supra.* But challenging the right of the occupant by bringing him into court is as direct and as positive an assertion of right as could well be made.

Our statutes of limitation deal quite liberally with the invader who hoists a hostile flag over that which does not belong to him. Where the true owner finds the intruder and proceeds to assert his rights by taking the necessary legal steps to evict such intruder, we think it should be held that there-

after the statute of limitations ceases to run either in favor of the actual occupant or one who occupies the relation of landlord to such occupant. It follows from what has been said that the judgment appealed from is correct.

By the Court.—Judgment affirmed.

ACME GROUND RENT COMPANY, Respondent, vs. WERNER and another, Appellants.

November 22—December 10, 1912.

Landlord and tenant: Rent: Premises rendered "untenantable" by fire: Surrender of possession.

1. In order to be released from payment of rent, under sec. 2196*a*, Stats. (Supp. 1906: Laws of 1903, ch. 306), the lessee must surrender possession of the leased premises.
2. But under a lease providing, without reference to surrender of possession, that "while the demised premises are untenantable, caused by fire, rent shall cease for such period," no rent was payable for the period of untenantability so caused, even though the lessee retained possession.
3. The premises become "untenantable," within the meaning of such a lease, when by the fire they are rendered absolutely unfit for the beneficial uses for which they were leased. Thus, a store building leased to be used and occupied "for the sale of ladies', misses', and children's wearing apparel, and for no other purpose whatsoever," became untenantable when it was so damaged by fire that it was not possible to use it for the sale of goods, although, with boards nailed over the broken windows and doors, it might be and was in fact used, pending adjustment of insurance, for storing goods damaged by the fire.

SIEBECKER, KERWIN, and BARNES, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellants there was a brief by *W. B. Rubin,* attor-

ney, and *Max Schoetz, Jr.*, and *Horace B. Walmsley*, of counsel, and oral argument by *Mr. Schoetz.*

A. Huebschmann, for the respondent.

WINSLOW, C. J. The defendants in July, 1910, leased of plaintiff a store building in Milwaukee "to be used and occupied as and for the sale of ladies,' misses,' and children's wearing apparel and for no other purpose whatsoever." The lease also contained the following provisions:

"And it is further mutually agreed, by the parties hereto, that in case said premises shall be rendered untenantable by fire or other casualty, the lessors may at their option terminate this lease or repair said premises within sixty days, and failing to so repair the same, or upon the destruction of said premises by fire, the term hereby created shall cease and determine, and in case of the damage by fire or other casualty to any building belonging to the lessors, of which building the premises hereby demised are a part, then the lessors may at their option terminate this lease by giving said lessee thirty days' written notice of their election so to do, and thereupon this lease shall terminate thirty days after the service of such notice. While the demised premises are untenantable, caused by fire, rent shall cease for such period."

On January 6, 1912, a fire occurred and damaged the building so that it was not possible to use the same for the sale of goods. The damage was not so great, however, but that the doors could be locked and the goods safely remain in the store, and by request of the insurance companies the goods were left on the shelves pending the adjustment of the insurance and until March 19th, when the lease was canceled by the plaintiff and repairs were begun. There was no competent testimony showing any surrender of possession by the defendants to the plaintiff during this interval, hence it must be considered that the defendants remained in possession.

This action was brought by the plaintiff to recover the rent accruing under the terms of the lease for the period from January 6th to March 22d. On the facts above stated a ver-

dict for the plaintiff was directed and rendered, and the only question on this appeal is whether that direction was right.

In support of the judgment below we are cited to a number of cases construing the very common statutory provision which declares that a tenant may surrender possession of leased premises which have been destroyed or made untenantable by fire or similar cause and thereby be released from further payment of rent. Sec. 2196*a*, Stats. (Supp. 1906: Laws of 1903, ch. 306). These cases universally hold that the lessee must surrender possession in order to be released from payment of rent under this provision. Typical cases of this kind are *Johnson v. Oppenheim,* 55 N. Y. 280; *Roach v. Peterson,* 47 Minn. 291, 50 N. W. 80; and *Gay v. Davey,* 47 Ohio St. 396, 25 N. E. 425.

If the defendants' rights in this action were dependent upon the statute, we do not see how the judgment could be disturbed, but they are not. The lease contains provisions on that subject which clearly guarantee to the tenants greater rights and privileges than those given by the statute. These provisions, after giving the lessor certain options as to the termination of the lease, or the making of repairs in case of destruction of the building, or untenantability produced by fire or other casualty, contain this definite and positive clause: "While the demised premises are untenantable, caused by fire, rent shall cease for such period." The words are about as clear as they could well be made. They were unquestionably intended to give the tenants greater rights than those secured to them by the statute, or they would be wholly unnecessary. They say nothing about surrender of possession. They declare, without qualification, that the rent shall cease while the premises are untenantable, and we are not at liberty to add further conditions. If, during the period sued for, the premises were "untenantable" within the meaning of that word as used in the lease, there can be no recovery, notwithstanding possession was retained. *Kip v. Merwin,* 52 N. Y. 542.

There is no doubt that the fire so damaged the store building that it was impossible to conduct a retail business therein, *i. e.* it was impossible to use it for the purposes for which it was leased. It was, however, possible, by nailing boards over the broken windows and doors, to use the store as a storage room for the damaged goods pending the adjustment of the fire insurance. This was done, and the question is whether this fact made the building "tenantable."

The word must have a reasonable construction, taking into consideration the purposes of the lease and the uses to which the premises are to be put by the lessee. Where the evidence is conflicting it is said to be a question of fact for the jury. *Weeber v. Hawes,* 80 Minn. 476, 83 N. W. 447; 18 Am. & Eng. Ency. of Law (2d ed.) 315 (f).

"Untenantability" evidently does not require such complete destruction of the premises that they cannot be used for any purpose. A house leased for a dwelling house would quite surely be "untenantable" if it were rendered unfit for a human habitation, notwithstanding the fact that the damaged furniture might safely be stored therein by nailing up windows and doors. So here, it stands without dispute that this store was rendered absolutely unfit for the beneficial uses for which it was leased, and it seems to us that it was as clearly "untenantable" as if it were a house leased as a residence and rendered unfit to reside in.

A verdict for the defendant should have been directed.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendant dismissing the complaint on the merits.

The following opinion was filed January 7, 1913:

SIEBECKER, J. (*dissenting*). If the "premises shall be rendered untenantable by fire . . . the lessors may at their option terminate this lease or repair said premises within sixty

days, and failing to so repair the same, . . . the term hereby created shall cease and determine. . . . While the demised premises are untenantable, caused by fire, the rent shall cease for such period." The foregoing portion of the lease controls the case. The lease was not terminated by the lessor under either option, that is, by notice of termination, or by failure to repair within sixty days. Repairing was postponed at the lessee's request so that he might occupy the premises for the purpose of conducting and carrying on negotiations for settlement with the insurance company. This left the lease in full operation and force, and rendered the lessee liable for rent unless he was exempted from rent by the following clause, namely: "While the demised premises are untenantable, caused by fire, rent shall cease for such period." The trial court held defendant was not released from payment of rent from the date of the fire to the time when the lease was canceled by mutual consent, upon the grounds, first, that the premises were held by the lessee and used by him as tenantable for the purpose of business during this period, and secondly, because the lessee elected to treat the lease as in full force and effect and thereby prevented the lessor from making the repairs provided for in the lease. It is clear that the tenant held the premises for this period and used them exclusively for his benefit to enforce a claim against the insurance company. This occupancy of the premises was as clearly one for the conduct of the business of the lessee as if the business had been conducted as it had been before the fire, and it effectually operated to exclude the lessor therefrom and prevent it from making any repairs on the building. Under the circumstances the premises were not untenantable in the sense that the lessee could not use them for his business and as the word was employed in the clause of the lease providing for a cessation of rent. Under the circumstances and conditions it must be held that the tenant elected to treat the premises as tenantable, for he thereby prevented the lessor from acting on

the provisions of the lease as to repairs and for termination of the term by notice. Hence the relation of landlord and tenant and the liabilities created by the lease continued to the time it was canceled by mutual consent. The judgment awarded by the trial court should be affirmed.

I am authorized to state that Mr. Justice KERWIN and Mr. Justice BARNES concur in this opinion.

CADY, Appellant, vs. HENES, Respondent.

November 23—December 10, 1912.

Deeds: Covenant against incumbrances: Action for breach: Pleading: Sufficiency of complaint: When special assessment becomes a lien on land.

1. A special assessment for a street improvement in the city of Milwaukee becomes a lien upon an abutting lot when the certificate stating the amount chargeable thereto is issued to the contractor pursuant to secs. 13 and 13*a*, ch. VII, of the city charter.
2. In an action for breach of the covenant in a warranty deed that the premises conveyed were free and clear from all incumbrances, a complaint alleging that at the time of the conveyance the premises were subject to a special assessment of a certain amount for street improvements, which had been "duly and legally levied" upon the property pursuant to the city charter, as a special improvement tax, and was "a legal and valid subsisting lien upon the real estate conveyed, . . . and was then remaining due and unpaid, and was at the time of the delivery of the said deed a lien and incumbrance by law upon said premises," sufficiently alleges these matters to permit the introduction of evidence that all the requirements prescribed in the charter to charge the land with the cost of the improvement had been complied with.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

The appeal is from an order sustaining a demurrer to the complaint.

Charles E. Hammersley, for the appellant.

Arthur Breslauer, for the respondent.

SIEBECKER, J. The complaint alleges that on June 9, 1910, the defendant, by warranty deed, conveyed to the plaintiff, for a valuable consideration, certain real estate in the city of Milwaukee.

The deed contains this covenant respecting the premises: "that the same are free and clear from all incumbrances whatever," subject to an agreement. The complaint alleges that at the time the premises were conveyed they were not free from incumbrances, but were subject to a special assessment for street improvements for the year 1909, which was a legal and valid lien upon the premises at the time the conveyance was made and which was then due and unpaid. It is also alleged that the price paid by the plaintiff included the value of the street improvement and that there was nothing in the appearance of the premises to warn the plaintiff that the improvements had been made recently. The plaintiff was compelled on January 31, 1911, to pay $261.30 to free the premises from the lien of the special assessment, and it is alleged that by reason thereof she was damaged in this sum. It is alleged that demand has been made by the plaintiff on the defendant and that defendant has refused to pay the sum. Judgment is demanded for the amount paid by the plaintiff, with interest and costs of the action.

The allegations of the complaint are that this amount was "duly and legally levied under and pursuant to the provisions of the charter of the city of Milwaukee, as special improvement tax, and was, at the time of the sale of this property to the plaintiff, a legal and valid subsisting lien upon the real estate conveyed by the defendant to the plaintiff, and was then remaining due and unpaid, and was, at the time of the deliv-

ery of said deed, a lien and incumbrance by law upon said premises." The allegations of the complaint must be liberally construed. In the light of this rule, we deem the allegations sufficiently broad and definite to state a good cause of action for recovery of damages for the breach of the covenant against incumbrances.

Respondent concedes that the special assessments for street improvements are taxes, but maintains that they are not a lien on property until properly assessed and levied and until certificates have been issued therefor as provided by law. Sec. 13, ch. VII, of the charter of the city of Milwaukee provides that, when street improvements have been completed, a certificate shall issue to the contractor, signed by the board of public works and countersigned by the city comptroller, stating the amount chargeable to the lots described therein, which certificate may be paid by the owner of the land to the city treasurer, for the benefit of the certificate holder, at any time before the sale of such land for the nonpayment of taxes. Sec. 13*a* of this chapter of the charter provides, if such amount is not paid by the lotowner to the city treasurer before the time for making out the annual tax list, then the amount shall be assessed against the land and be collected as other taxes on real estate. It is also provided that all certificates issued pursuant to the charter provisions "shall be liens upon the lots or parcels of land against which the same shall respectively be chargeable, from and after the time when such certificates shall be countersigned and registered by the city comptroller." It is manifest from these provisions that the alleged special assessment became a lien on the land from the time the certificate issued pursuant to these provisions of the charter.

It is argued that the complaint fails to allege facts showing that these steps were taken so as to charge the lands conveyed for the cost of the assessment as a tax. We are of opinion

that the language of the complaint sufficiently alleges these matters to permit the introduction of evidence showing that all the requirements prescribed in the charter to charge this land with the cost of the street improvement were complied with, and that they constituted a lien prior to January 1, 1910. If, then, the allegations of the complaint are sustained by evidence upon the trial of the case showing that a lien for taxes on the land conveyed was existent before January 1, 1910, then the covenant in the deed against incumbrances would be breached, and the plaintiff would be entitled to recover the amount she was compelled to pay to free the land from such tax lien. See sec. 1153, Stats., as amended by ch. 293, Laws of 1909, and *Mitchell v. Pillsbury,* 5 Wis. 407; *Peters v. Meyers,* 22 Wis. 602.

The allegations of the complaint state facts sufficient to constitute a cause of action.

By the Court.—The order appealed from is reversed, and the cause remanded to the trial court with directions to enter an order overruling the demurrer to the complaint, and for further proceedings according to law.

EHNERT, Respondent, vs. MEWS, Appellant.

November 23—December 10, 1912.

Negligence: Collision on street: Contributory negligence: Evidence: Questions for jury.

1. In an action for personal injuries sustained in a collision between a buggy in which plaintiff was riding and a team of horses driven by defendant, a finding by the jury that plaintiff was free from contributory negligence is *held* to be sustained by the evidence, which tended to show, among other things, that plaintiff was on the right side of the street, going at a lawful rate of speed, and had the right of way under a city ordinance;

that defendant was crossing the street at a rapid rate, exceeding the speed limit under the ordinance; and that he drove into the plaintiff without fault on her part.

2. Evidence in such case that the plaintiff had turned out or made a curve in order to pass in front of another team which was crossing in the same direction as defendant but nearer to her, would not, even if true, establish negligence on her part as a matter of law.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries resulting to the plaintiff while she was riding in a single top buggy going southerly on the west side of Eleventh street in the city of Milwaukee. The defendant, who was driving a team of horses, collided with the plaintiff on Eleventh street at the intersection of Vliet street, causing the injuries complained of. The answer admits the collision and denies all other allegations of the complaint. A motion for directed verdict in favor of the defendant was denied, and the jury returned the following verdict:

"(1) Was the defendant guilty of a want of ordinary care which was a proximate cause of plaintiff's injury? *A.* Yes.

"(2) Ought the plaintiff, in the exercise of ordinary care, to have seen defendant's team in time to have avoided the injury? *A.* No.

"(3) Was the plaintiff driving at an unreasonable rate of speed at and just prior to the time of the accident? *A.* No.

"(4) If you answer either question 2 or question 3 'Yes,' then was such want of ordinary care so found a proximate cause of plaintiff's injury? *A.* ——.

"(5) At what sum do you assess plaintiff's damages? *A.* $4,000."

Motions were made for judgment in favor of the defendant notwithstanding the verdict, to change the answers to the first, second, and third questions of the verdict and for judgment upon the verdict as so amended, and for a new trial, all of which were denied. Due exceptions were filed to the rulings

of the court in the various particulars above named. Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

For the appellant there was a brief by *Reukema & Lemke,* and oral argument by *Otto A. Lemke.*

For the respondent there was a brief by *Churchill, Bennett & Churchill,* and oral argument by *W. H. Churchill.*

KERWIN, J. The jury answered all the questions in favor of the respondent, and the controlling question in the case is whether such findings are supported by the evidence.

The assignments of error raise two questions: (1) Whether the evidence is sufficient to support the verdict; and (2) Whether the court below erred in instructing the jury and in refusing to instruct.

There is no doubt whatever but that the evidence is ample to warrant the jury in finding that defendant was guilty of negligence which proximately caused the injury, and the only room for contention is upon the contributory negligence of the respondent.

Counsel for appellant very strenuously urges upon us, both in his brief and on oral argument, that there is not sufficient evidence to support the finding of the jury that the plaintiff was not guilty of contributory negligence. In view of counsel's insistence upon this point we have carefully examined all the evidence touching the question and are forced to the conclusion that the finding has support in the evidence. The collision occurred at the intersection of Eleventh and Vliet streets in the city of Milwaukee in the evening of October 12, 1910. It was getting dark. Eleventh street runs north and south and Vliet street east and west. A city ordinance was put in evidence limiting the speed of vehicles drawn by horses to eight miles an hour, and to four miles an hour crossing streets running north and south. The ordinance further provides that on streets and highways of the city vehicles going in

a northerly or southerly direction shall have the right of way over vehicles going in an easterly or westerly direction. At the time of the collision the respondent was driving south along the west side of Eleventh street in a buggy drawn by one horse, which was very gentle, a family-broke horse kept for hire to families and women. The buggy was a new, strong livery buggy. The appellant was driving west on Vliet street in a baker's delivery wagon drawn by two young, lively horses. Respondent was driving at a "moderate rate," "not as fast as five or six miles an hour." Appellant was driving at a "faster gait," "going at a pretty good rate of speed." The evidence further tends to show that when respondent got near Vliet street she looked up and down the street east and west to see if everything was clear, that she saw nothing in sight, and drove across over the north track and then heard the crash; she did not go fast, because the horse would not go fast; she was perfectly familiar with Eleventh street and the crossing where the accident occurred and knew it was an intersection of several streets, and that it is a busy place at that hour of the day. Respondent's buggy was badly smashed, the right hind wheel was entirely torn off and the top smashed entirely by the collision. The place of collision was at a point about twenty feet east of the west curb line of Eleventh street. Respondent testified that she did not see appellant's team before the accident happened and did not see how the team ran into the buggy. There is some evidence that respondent turned to the southwest to pass a team just before the accident. This is denied by respondent. One of respondent's witnesses on cross-examination testified:

"A team was going westward on Vliet street and *Mews* was also going westward or northwesterly on Winnebago street. That team from Vliet street crossed Eleventh street, going straight up Vliet street. Plaintiff passed that team and went ahead of it. When plaintiff went ahead of that team *Mews* was right aside of that team. That team and *Mews* were both going westward and *Mews* was right next to that team.

Miss Ehnert went south ahead of that team, and after she passed that team is when *Mews* ran into her. In order to pass *Mews's* team she made a little bow there that brought her over Eleventh street on the crossing. She made that bow in order to be able to pass the other team. If she had not made that bow she would have run into that other team, and would have run into *Mews.*"

The evidence of respondent is quite positive that she drove carefully across and was on the lookout for the entire distance of forty feet north of the north curb line of Vliet street. There is also evidence that there was another team coming down Vliet street at the time of the collision, and that the three teams came together on Eleventh and Vliet streets; that the appellant's team was going at a fair speed, but slacked down when he got close "into the bunch there;" that he tried hard to stop, but still the team went into respondent's buggy.

There is evidence that at the time of the collision appellant came up and respondent tried to get out of his way; that appellant had a young team and tried to check them, and naturally in checking the team the pole went in through the wheel and hit the top and knocked the buggy around.

It would serve no useful purpose to review the evidence in detail. It clearly tends to show that the respondent was where she had a right to be, on the west side of Eleventh street, and was going at a lawful rate of speed and had the right of way under the ordinance; that the appellant was going at quite a rapid rate of speed, exceeding the speed limit under the ordinance, and that he drove into the respondent without any fault or negligence on her part,—at least the jury would be entitled to so find. Under these circumstances the question of respondent's negligence was clearly for the jury.

The numerous railway-crossing cases cited by appellant bearing upon the "look and listen" rule, for obvious reasons are not controlling here. Much stress is placed upon *Weber v. Swallow,* 136 Wis. 46, 116 N. W. 844, by counsel for ap-

pellant, but a careful examination of that case will show that it is very different in its facts from the instant case. The collision there occurred between a bicycle and an automobile, and the relative position of the parties, the opportunities for seeing and observing, and the duty resting upon the plaintiff to have observed and avoided the automobile when it emerged from behind the car, were so conclusively established as to leave no question for the jury on the issue of contributory negligence. The instant case presents no such situation.

Much stress is also placed upon the fact that the injury was occasioned by respondent turning out. But the evidence as to turning out or curving is denied, and, even if true, it by no means establishes negligence on the part of respondent as matter of law. Respondent was instantly put in a place of danger without fault on her part by getting into the "bunch." Even if she did turn or curve under such circumstances it was for the jury to say whether such act was negligence which contributed to the injury.

Appellant excepts to certain parts of the charge. We have carefully examined the charge and find that it contains no prejudicial error. Certain requests to charge were made which were refused, which refusal is assigned as error. We think the requests were properly refused. We cannot say upon the record that the damages are excessive.

By the Court.—The judgment is affirmed.

CASES DETERMINED

AT THE

January Term, 1913.

UBER and others, Respondents, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

September 18, 1912—January 7, 1913.

Carriers: Damage to goods in transit: Interstate shipment: Action against initial or connecting carrier: Perishable goods: Negligence in giving notice of arrival: Proximate cause of damage: Contributory negligence: Indirect routing.

1. The federal statute (34 U. S. Stats. at Large, 595, ch. 3591) which gives a right of action against the initial carrier for loss or damage to property shipped from one state into another, does not take away rights of action such as theretofore existed against connecting carriers. *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, followed.
2. Evidence that on September 10th or 11th a carload of pelts was shipped from Michigan to Milwaukee, Wisconsin, under a bill of lading which made it the duty of the defendant, the last carrier, to notify plaintiffs at Hartford, Wisconsin, of the arrival of the car in Milwaukee; that defendant knew the goods were perishable; that the car arrived in Milwaukee early on the morning of September 15th, but plaintiffs were not notified until September 20th, although the notice could have been given much sooner; that the pelts would remain in good condition at least eight or ten days in warm and longer in cool weather; that they did not reach Hartford until September 23d, and plaintiffs were not notified of their arrival until September 24th, when the pelts were found to be spoiled,—is *held* sufficient to sustain findings by the jury that defendant was neg-

ligent in giving notice of the arrival of the car in Milwaukee, and that such negligence was the proximate cause of the loss.

3. The fact that the shipment was routed to Milwaukee instead of direct to Hartford, although it may have contributed proximately to the spoiling of the pelts, did not establish contributory negligence on the part of the shippers, it appearing that there was ample time to transport the pelts without injury by the route selected if defendant had exercised proper care.

APPEAL from a judgment of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

This action was brought to recover damages occasioned by the loss of a carload of sheep pelts shipped from Monroe, Michigan, consigned to the "order of Mainzinger Bros., Milwaukee, Wisconsin, notify Uber Bros. at Hartford, Wisconsin." The pelts were shipped September 10 or 11, 1909, over the Lake Shore & Michigan Southern Railway and received by defendant as connecting carrier at Franklin Park Junction, Illinois, on the 14th day of September, 1909, at 2:35 p. m. The car went forward from Franklin Park Junction September 14, 1909, at 6:10 p. m. From Franklin Park Junction to Milwaukee is less than a ten-hour run. The evidence tends to show that the car arrived in Milwaukee early on the morning of September 15th, and Uber Bros. were not notified until the morning of September 20th. The notification was by mailgram, which is a message sent by train. It was admitted upon the trial by counsel for defendant that upon the arrival of the car at Milwaukee it was the duty of the agent to notify Uber Bros. of the arrival of the goods. The agent of defendant at Milwaukee knew whom the car was for and that it contained perishable property. To insure prompt delivery of the car a tracer was ordered put to the car. The pelts were in good condition when loaded and would remain so for eight or ten days in warm weather.

At the close of the evidence a motion was made by defend-

ant for directed verdict, which was denied, and the jury returned the following verdict:

"(1) Were the pelts in question spoiled while in transit from Monroe, Michigan, to Hartford, Wisconsin? *A.* (by the court). Yes.

"(2) Did the defendant exercise reasonable care and diligence in notifying plaintiffs of the arrival of said shipment of pelts in Milwaukee? *A.* No.

"(3) If you answer the second question 'No,' then answer this question: Was such failure to exercise reasonable care and diligence in giving notice the proximate cause of the spoiling of said pelts? *A.* Yes.

"(4) Did the act of the shippers in routing the shipment to Milwaukee instead of Hartford contribute proximately to the spoiling of the pelts? *A.* Yes.

"(5) Were the shippers guilty of any negligence on their part in loading the pelts which contributed proximately to the spoiling thereof? *A.* No.

"(6) What sum of money will compensate plaintiffs for the damages suffered in consequence of the spoiling of said pelts? *A.* (by the court). Twelve hundred fifty-one and 35/100 dollars."

Motions of defendant to change the answer of the second question from "No" to "Yes" and for judgment upon the verdict as corrected, also for judgment based upon the verdict and the minutes of the court, were denied and due exception taken. Judgment was entered in favor of the plaintiffs, from which this appeal was taken.

For the appellant there were briefs by *C. H. Van Alstine, H. J. Killilea,* and *Rodger M. Trump,* and oral argument by *Mr. Van Alstine* and *Mr. Trump.*

J. C. Russell, for the respondent.

The following opinion was filed October 8, 1912:

KERWIN, J. It is first insisted by counsel for appellant that this action cannot be maintained because of the Carmack amendment to the Hepburn act (34 U. S. Stats. at Large,

595, ch. 3591), which makes the initial carrier liable, hence the action in this case should have been commenced against the initial carrier, the Lake Shore & Michigan Southern Railway Company. This question was considered in *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794, and this court said: "We think the rule established by this court, that action may be maintained against the last carrier, is still in force and not abrogated by the Carmack amendment." We are asked by counsel for appellant to reconsider this statement, and it is urged that it is not the law, but on the contrary it is insisted that the action cannot be maintained against the last carrier since the passage of the Carmack amendment. The contention of counsel upon this point is in substance that the contract of shipment from Monroe, Michigan, to Milwaukee, Wisconsin, was an interstate commerce contract under which the initial carrier was made liable under the Carmack amendment, the connecting carrier, the defendant here, being merely the agent of the initial carrier, therefore not liable to the plaintiffs; that Congress having legislated respecting the matter, such act superseded all state laws, statutory and common, covering the same field. Whether this contention would be sound in the absence of the proviso in the Carmack act, namely, "provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," we need not consider. We think it clear from the whole act that the purpose of Congress was to give a remedy absolutely in all cases against the initial carrier, but at the same time preserve all remedies existing before the passage of such act. Now, before the passage of the Carmack act the plaintiffs in this state clearly would have a remedy against the last carrier, and, as we held in the *Tradewell Case,* we do not think that remedy was abrogated. We have carefully considered the argument of counsel and the authorities cited upon this proposition and are still of the opinion that

the action in this case was properly brought against the last carrier. *Tradewell v. C. & N. W. R. Co., supra; L. Struebing Co. v. Merchants D. T. Co.* 142 Wis. 657, 126 N. W. 21; *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138, 76 N. W. 1123; *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204; *Stolze v. A. A. R. Co.* 148 Wis. 205, 134 N. W. 376.

The evidence in this case is ample to support a finding that the goods were in good condition when received by the defendant and were damaged when they reached Hartford, Wisconsin. The defendant, therefore, is liable unless it appears that the damage was through some cause for which it is not responsible.

The negligence relied upon here by plaintiffs is the failure of defendant to seasonably give notice of the arrival of the shipment of pelts in Milwaukee. It is claimed by counsel that the second and third questions of the special verdict, on the giving of notice and whether failure of defendant to exercise reasonable care in giving notice was the proximate cause of the damage, are contrary to the evidence, and in this behalf it is insisted that the defendant owed no duty to give notice to the plaintiffs. It appears, however, that the bill of lading contained the words "notify Uber Bros. at Hartford, Wisconsin," and the plaintiffs offered evidence of custom existing to that effect, which evidence was ruled out. Counsel for defendant on the trial, however, admitted that it was the duty of the defendant to give the notice. So we think it was fairly established in the case that the defendant's duty as a common carrier required it to give notice to plaintiffs of the arrival of the car at Milwaukee. The question, therefore, arises whether there is sufficient evidence to support the answer of the jury to the second question of the special verdict. It appears from the evidence that the car arrived in Milwaukee on the morning of the 15th of September and that plaintiffs were not notified of such arrival until September 20th. In view of the facts that the goods were perishable and that

defendant knew it, and that notice could have been given in a much shorter time, and also in view of the evidence tending to show that the delay was sufficient to cause the damage because the pelts would remain in good condition for at least eight or ten days in warm and longer in cool weather, it was a question for the jury to say whether or not the defendant exercised reasonable care and diligence in notifying plaintiffs. So we think it cannot be said that the second question of the special verdict is not supported by the evidence.

We also think that the third question, as to whether or not the failure to exercise care in giving notice was the proximate cause of the spoiling of the pelts, is supported by the evidence. It is argued that unless the pelts became damaged between the 16th and 20th of September the failure to give notice of the arrival in Milwaukee was not the proximate cause of such damage, and that there is not a scintilla of evidence tending to show that the pelts were damaged between those dates. We do not think it necessary, in order to entitle plaintiffs to recover, to show that the pelts were damaged between the 16th and 20th, although we think the jury would be warranted from the evidence in finding that the damage occurred during that period, in view of the fact that the proof tends to show that the pelts were shipped on the 10th or 11th of September and would remain in good condition for eight or ten days in warm and longer in cool weather, and that notice was not given until the 20th. The evidence also tends to show that the car did not reach Hartford until September 23d and that plaintiffs were not notified of such arrival until the 24th. This evidence shows that the pelts were not damaged until after they arrived at Milwaukee.

It is further insisted that the evidence shows contributory negligence on the part of the plaintiffs. There is no finding of contributory negligence, but in the fourth question of the special verdict the jury found that the act of the shippers in routing the shipment to Milwaukee instead of Hartford con-

tributed proximately to the spoiling of the pelts. It will be observed, however, that the answer to the fourth question does not find that the shippers were negligent in routing the shipment to Milwaukee instead of Hartford, but that it only contributed to the spoiling of the pelts. This obviously is based upon the idea that it took a longer time to ship to Milwaukee and then to Hartford than direct to Hartford; but it by no means follows that this established contributory negligence on the part of the shippers, because they had a right to select the route if shipment by the route selected could be made in the exercise of ordinary care without damage to the pelts. There was ample time to route by Milwaukee without injuring the pelts if proper care had been exercised on the part of the defendant. It was not established, therefore, that the plaintiffs were guilty of contributory negligence. *Stucke v. M. & M. R. Co.* 9 Wis. 202; *Valin v. M. & N. R. Co.* 82 Wis. 1, 51 N. W. 1084; *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138, 76 N. W. 1123; 1 Shearman & Redf. Neg. (5th ed.) § 99.

We are convinced that no error was committed on the trial and that the findings of the jury are supported by the evidence.

By the Court.—The judgment is affirmed.

TIMLIN, J., dissents.

A motion for a rehearing was denied, with $25 costs, on January 7, 1913.

ARNOLD, Respondent, vs. INGRAM, imp., Appellant.

October 10, 1912—January 7, 1913.

Libel: Liability of person delivering article for publication: What statements libelous: Privilege: Comment on candidates for office: Questions for court and for jury: Meaning of words: Publication to be considered as a whole: Malice: Burden of proof: Excessive publication.

1. One who delivers a libelous article to a newspaper for publication, with knowledge of what it contains, is responsible for the publication thereof.
2. To render an alleged libelous publication actionable, the defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If they are merely general statements or comments, reflecting on no particular individual, no averment or innuendo can make them defamatory.
3. A publication in the nature of an appeal by one elector to others to overthrow a ruling political clique and all who adhere to it, which imputes to its candidates no crime and employs toward them no degrading or insulting epithets, but denounces them in extravagant language as unfit for office, unworthy of public confidence, and derelict in their duties, does not go beyond the bounds of fair comment and criticism and is privileged.
4. Thus, a statement in such a publication, describing plaintiff as a candidate for whom a self-respecting man could not vote, will not support a recovery in libel.
5. Where the most specific and serious accusations made in the alleged libelous publication against plaintiff, a candidate for office, are found by the jury to be true, and others, found to be untrue, are in the nature of conclusions or argumentative inferences as to his fitness for office, the protection of privilege must be accorded to the whole.
6. The qualified privilege to discuss the relative demerits of a candidate for office is broader than the mere right of fair comment and criticism applicable to a book, a play, or other similar thing offered to the public.
7. In libel, words are to be understood according to their plain and natural import, and where there is no ambiguity in the language its meaning is for the court to determine.
8. The court also determines whether the case was one affording a qualified privilege or the right of fair comment and criticism.
9. The question of malice is for the jury; also the question of the meaning of the alleged libel when the words used are ambigu-

ous or fairly susceptible of a libelous meaning, the question being as to how they were understood by the persons to whom they were originally published.

10. Defendant is entitled to have the alleged libel considered as a whole and not in isolated passages.

11. When a *prima facie* case of privilege has been made out by proof that the publication charged as libelous was made from a sense of public duty and with an honest belief in its truth, it then devolves upon the plaintiff to prove actual malice by some facts tending to show a malicious or guilty motive,—failing which, he cannot recover.

12. Although a newspaper article would be actionable but for the qualified privilege of discussing plaintiff's fitness for a county office, any excessive publication arising from the fact that the newspaper had some circulation outside the county is merely incidental and, in the absence of malice, gives no right of action.

BARNES, J., dissents.

APPEAL from a judgment of the circuit court for Eau Claire county: E. W. HELMS, Judge. *Reversed.*

The appeal is by the defendant *O. H. Ingram* from a judgment rendered against both defendants for $525 damages and $277.28 costs. The facts are fully stated in the opinion.

For the appellant there were briefs by *L. A. Doolittle,* attorney, and *Bundy & Wilcox,* of counsel, and oral argument by *Mr. Doolittle* and *Mr. C. T. Bundy.* Upon the question of excessive publication they cited 25 Cyc. 387; *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281, 20 L. R. A. N. S. 361; *Redgate v. Roush,* 61 Kan. 480, 59 Pac. 1050; *Mertens v. Bee Pub. Co.* 5 Neb. (Unof.) 592, 99 N. W. 847; *Hatch v. Lane,* 105 Mass. 394; *Shurtleff v. Stevens,* 51 Vt. 501; *Fahr v. Hayes,* 50 N. J. Law, 275, 13 Atl. 261; *Sheftall v. Central of Ga. R. Co.* 123 Ga. 589, 51 S. E. 646; *Pittard v. Oliver,* [1891] 1 Q. B. 474; *Padmore v. Lawrence,* 11 Ad. & El. 380; *Brow v. Hathaway,* 13 Allen, 239; *Davies v. Snead,* L. R. 5 Q. B. 608; *Dale v. Harris,* 109 Mass. 193. As to privilege and the necessity of proving actual malice they cited, among other cases, *State v. Balch,* 31 Kan. 465, 2 Pac. 609;

Wilson v. Noonan, 35 Wis. 321, 349; *Rude v. Nass,* 79 Wis. 321, 325, 48 N. W. 555; *Karger v. Rich,* 81 Wis. 177, 51 N. W. 424; *Brown v. Vannaman,* 85 Wis. 451, 455, 55 N. W. 183; *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913; *Briggs v. Garrett,* 111 Pa. St. 404, 2 Atl. 513; *Hamilton v. Eno,* 81 N. Y. 116, 122; *Wright v. Woodgate,* 2 Cromp. M. & R. 577; *White v. Nicholls,* 3 How. 266, 287; *Jenoure v. Delmege,* [1891] App. Cas. 73, 78; *Bays v. Hunt,* 60 Iowa, 251, 14 N. W. 785; *Carpenter v. Bailey,* 53 N. H. 590; *Jackson v. Pittsburgh Times,* 152 Pa. St. 406, 25 Atl. 613; *O'Rourke v. Lewiston D. S. P. Co.* 89 Me. 310, 36 Atl. 398; *Miner v. Detroit P. & T. Co.* 49 Mich. 358, 13 N. W. 773; *Lewis v. Chapman,* 16 N. Y. 369; *Fowles v. Bowen,* 30 N. Y. 20; *Ross v. Ward,* 14 S. Dak. 240, 85 N. W. 182; *Hemmens v. Nelson,* 138 N. Y. 517, 34 N. E. 342; *Marks v. Baker,* 28 Minn. 162, 9 N. W. 678; *Henry v. Moberly,* 23 Ind. App. 305, 51 N. E. 497; *Laing v. Nelson,* 40 Neb. 252, 58 N. W. 846; *Howard v. Thompson,* 1 Am. L. C. (5th ed.) 175, 193 (21 Wend. 319, 34 Am. Dec. 238); *King v. Patterson,* 49 N. J. Law, 417, 9 Atl. 705; *Wright v. Lothrop,* 149 Mass. 385, 21 N. E. 963; *Palmer v. Concord,* 48 N. H. 211.

For the respondent there was a brief by *V. W. James* and *Fred Arnold* in person, attorneys, and *T. D. Sheehan,* of counsel, and the cause was argued orally by *Mr. James.* They cited, among other authorities, *Smith v. Utley,* 92 Wis. 133, 65 N. W. 744; *Adamson v. Raymer,* 94 Wis. 248, 68 N. W. 1000; *Nehrling v. Herold Co.* 112 Wis. 558, 88 N. W. 614; *Burt v. Advertiser N. Co.* 154 Mass. 238, 28 N. E. 1; *Bearce v. Bass,* 88 Me. 521, 34 Atl. 411; *Tawney v. Simonson, W. & H. Co.* 109 Minn. 341, 124 N. W. 229; *Pfister v. Milwaukee Free Press Co.* 139 Wis. 627, 121 N. W. 938; *King v. Root,* 4 Wend. 113, 114; *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913; *Driessel v. Urkart,* 147 Wis. 154, 157, 132 N. W. 894; *Shurtleff v. Parker,* 130 Mass. 293; *Upton v. Hume,* 24 Oreg. 420, 33 Pac. 810; *McAllister v. Detroit Free Press Co.*

76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318 and note; *Bradley v. Cramer,* 59 Wis. 309, 312, 18 N. W. 268; *Hamlin v. Fantl,* 118 Wis. 594, 95 N. W. 955; *Smith v. Burrus,* 106 Mo. 94, 16 S. W. 881; *Belknap v. Ball,* 83 Mich. 583, 47 N. W. 674; *State v. Haskins,* 109 Iowa, 656, 80 N. W. 1063, 47 L. R. A. 223; *Buckstaff v. Hicks,* 94 Wis. 34, 68 N. W. 403.

The following opinion was filed October 29, 1912:

TIMLIN, J. In this action for libel against the appellant and one Granville Ross Pike it appeared that the latter was a clergyman who delivered a political sermon or discourse and sent a synopsis of it for publication to the Daily Telegram, a newspaper printed and published in the city of Eau Claire, another to the Eau Claire Leader, a like newspaper. There was evidence tending to show that the appellant in person delivered the manuscript of this synopsis to the publisher of the Daily Telegram, who published the same, and the jury so found, but found that the appellant did not deliver the manuscript of the synopsis of the sermon in question to the Eau Claire Leader. Only the defendant *Ingram* appeals.

The alleged libelous article is as follows:

"From the text Ps. 12:8, 'The wicked walk on every side, when the vilest men are exalted,' the Rev. Granville Ross Pike spoke yesterday morning at the First Congregational Church, on 'The Kakarky of Eau Claire.' He said in part:

"In one of the banks of this city is a most ingenious invention, which indicates what the weather is to be by means of an automatic pen controlled by the rising or falling of the mercury in the glass tube of the barometer. The record made is permanent, and the fluctuations of the weather may thus be read backward through months and years. Just such an automatic pen is the history of mankind. It records faithfully the fair weather of liberty or the foul weather of enslavement, according as the free spirit of a people has waxed or waned in their political institutions. 'Man,' says Aristotle, 'is by nature a political animal, and has endured or created every conceivable form of government.' He has suffered under mon-

archy, or the government by one; under oligarchy, or the government by a few; under anarchy, or no government at all. A measure of his progress in civilization and true development is found in the degree to which he approaches a real democracy or that mutual government succinctly described in Lincoln's classic phrase: 'A government of the people, by the people, and for the people.'

"Under whatever form of government the people might lie, so dominant is the selfish impulse in human nature, they have always been forced to contend with those who have seized supremacy for the sake of personal gain. The passage just read from the prophet Isaiah is a striking indictment of such an instance and its results in ancient Israel. Our text describes a similar condition and its consequences at a still earlier date. It is therefore one of the oldest and at the same time one of the newest usurpations of the rights and liberties of the commonwealth, to which I direct your attention this morning, in a consideration of The Kakarky of Eau Claire.

"At the present moment we here in Eau Claire are enduring the reign of a Kakarky, a government by the bad. We fondly imagine that we have elected by our free suffrages certain city officials to administer the affairs of the city honestly, economically, equably, and with due regard to decency and order, and that these officials are doing that which they have been elected or appointed to do. This, however, is an altogether mistaken notion. The real rulers of Eau Claire today are a clique of seventy-three men, who have no official place of authority, no fitness for such a position, and no respect from much the larger proportion of our citizens. We flatter ourselves that it is the men whose enterprise and industry have created the wealth and industrial and commercial prosperity of the city, the men whose moral probity and high standards have given Eau Claire a character for splendid citizenship among the municipalities of the state, men whose patriotic zeal and self-denying generosity toward the city of their habitation have built her institutions of learning, of mercy, and of justice, are those whose will shapes our municipal policy and determines the influences which surround the childhood, the womanhood, and the common manhood of our city. It is not so. The actual sovereigns of this city are the seventy-three men, sixty-eight retail saloonkeepers and

five wholesale liquor dealers, whom our culpable acquiescence has permitted to become enthroned as the dictators of the conditions under which we must live, transact our business, and bring up our children.

"The extent of their dominance is not generally recognized; if it were we would be roused to a revolt, which would sweep away utterly and at once that 'covenant with death and agreement with hell,' as Isaiah calls it, which, for a paltry forty-four thousand dollars, we have been seduced into making. Think a moment upon the measure of our subserviency. First, this monstrous autocracy has its hand in every business man's pocket, filching tribute under threat of boycott and antagonism. The Street Fair, just closed, is merely the latest, not the chief, instance of this. I asked business men if the Street Fair was of any advantage to them. One man said it had brought certain patrons of his to town and they had taken that occasion to settle their bills with him. This was the only favorable word that I heard. The others all declared it to be no help to trade; some called it a detriment to business, while still others declared that they would gladly have given twice as much to prevent the Fair coming, as they felt compelled to give to carry it on. Why, then, did all these merchants contribute? Because the seventy-three sent out word that they wanted the Street Fair and expected the business men of the town to largely finance it. Business is prostituted by the will of the saloonkeeper.

"The holiest sanctuary of a commonwealth is its law. This group of seventy-three rulers tramples with contempt upon the divine law of the Sabbath, written alike in the sacred decalogue and the still more sacred constitution of man; it spurns the statutes of Wisconsin, which declare that you shall do no business upon Sunday, except works of necessity or mercy, by systematically and persistently plying a nefarious trade, for which there is no necessity and in which there is no mercy; it ignores the fundamental ordinances of our city government, which prohibit the sale of liquor on Sunday, and sells to whomsoever will buy.

"This insolent domination creates an atmosphere of lawlessness and real anarchy, in which evil flourishes and good withers away. The time was when tropical plants flourished and tropical animals roamed, where for ages have been un-

melting ice fields and all vegetation has perished in the strangling grasp of continuous Arctic cold. The historic Campagna of Rome has become, through neglect, so saturated with malaria that it is well nigh utterly unfit for human habitation. There is a deadly exhalation from these sinks of iniquity—the regal palaces of our sovereign lords—which, like the deadly choke-damp of the mines, asphyxiates the moral sense of the community and paralyzes the energies of its administration. (1) [Officials, under its benumbing influence, violate their oaths of office,] juries are hypnotized into the giving of unjustifiable verdicts, and I myself, within the past fortnight, have heard a shrewd attorney of this city conduct three successive schools for the instruction of malefactors with what ease and impunity they might violate the laws of the land and of this municipality.

"Moreover, under the deadly shadow of this deadly upas tree, called the saloon, which is the throne of our rulers' power, there have sprung up other evils, grossly detrimental to the peace and welfare of the community. In the spirit of lawlessness engendered by the brazen defiance of law by this dominant element, opportunity is found for Sunday horse-racing, Sunday baseball, Sunday tournaments, and kindred violations of the quiet and sanctity of the day, to the great demoralization of our population. The Sunday theaters, unknown in this city four years ago, have become a large factor in the perversion, especially of the young people of the community, houses of a sort unfit to be named in decent company are always and everywhere the concomitants of the saloon and of saloon-dominated territory; gambling is fostered, encouraged, and developed in the saloon. Sweep these away, let in the flood of public attention and public interest and the uprising of public wrath upon these hiding places of evil, and they will be drowned out and washed clean, and with them will disappear altogether some of these evils and the residue will be greatly minimized.

"The serious question for each of us is: How may this hellish *régime* be overthrown? It is a problem which has confronted every people and every state at intervals since the dawn of history. Xenophon, the Greek historian, tells us how Athens, the glory and crown of art, of literature, of philosophy, fell into the hands of thirty tyrants, who violated her

public offices and wholly reversed the principles and traditions which, in making her free, had made her great. Eight months the citizens endured this reign of the Thirty. They then arose and overthrew these despots, killing some and driving the rest into exile. The pages of English history inform us how our own forefathers, wearied by the oppression of the Stuarts, arose and cast them out, beheading one, and when the restored line made no improvement, repudiated the house of Stuart altogether and established another. Our own ancestors, when the mother country sought to exercise unlawful jurisdiction over these colonies, wrote and maintained their immortal Declaration of Independence. Our own contemporaries in many of our cities, disgusted by the brazen effrontery and gross abuse of power of ruling factions, have risen and put them down. Eau Claire may be cleared of this pestiferous Kakarky by a similar assertion of manhood on the part of her citizens. The time is at hand in which to do this. Ten days hence occurs the election. When the ballots shall fall as lightly

> 'As snowflakes on the sod,
> Yet execute the freeman's will
> As lightning does the will of God,'

(2) [then will be opportunity to discriminate between those who have served the city and the community in public office, and those who have betrayed her]. (3) [The great danger is that the momentum of a Presidential ticket will carry with it into office those who are utterly unworthy of public confidence.] Partisanship in city affairs is the curse of city administration. There is no partisanship in the ranks of those whom, in the name of the home, the law, and the commonwealth the entire citizenship should rise up and hurl from their seats. (4) [Chicago is, even now, in the midst of such an attempt as we should make, to rid that city of the gang of those who, like our own Seventy-three, have purchased the privilege of plunder, by the nonpartisan election of a district attorney on an independent ticket, when neither party has provided a candidate for that office for whom a self-respecting man can vote.] (5) [If, in our city, you see a man in the office of district attorney, who has based his claim to re-election upon the ground that he saved the county money by re-

fusing to prosecute more than half the criminal cases which he was elected and paid to prosecute; *if you see an official who publicly, in the court room, apologizes for prosecuting the criminal at the bar and declares his personal disapproval of the law under which the defendant was arraigned; if you see an official who, in this city within the present year, has refused to prosecute a considerable number of cases so flagrant that when the judge before whom they were brought declared his intention to continue them the defendants at once pleaded guilty and were fined;* if you know an officer whose loyalty to this ruling clique is beyond question and whose fidelity to his oath of office is open to grave doubt, what matters it to you whether he disgraces the Republican or the Democratic ticket?] If you find a candidate for the office of sheriff, whom you know, from past actions and evidence, to be allied with this rule that must be overthrown, what bearing upon your vote in this matter should have the question of the national policy of protection or free trade? If you see men on either ticket, who, if elected, when this small but pernicious group of Seventy-three has been thrown out of the front door, will not allow them to sneak in at the back, does it matter which?

"On a wider field. If you can find among the candidates for the Assembly or for the Senate one who will stand for liberation rather than for further enslavement to this same dominant power that holds Eau Claire in its grasp, what need you care which party had the honor of placing such a man in nomination? The test of free suffrage is each man's liberty, without bondage to any, to vote for what and whom he considers right.

"Let the refreshing breeze of a nonpartisan ballot blow away the morally devitalized atmosphere which we have been breathing, replacing with the quickening ozone of righteousness (6) [this effluvia of corruption which is undermining our moral stamina and familiarizing our entire population with betrayal of trust in high places] (7) [and the practice of wickedness in low, until it is demonstrated anew before our own eyes, that the wicked indeed walk, or, as the original reads, 'Strut proudly on every side, when vileness is exalted among the sons of men']."

The whole synopsis of the sermon as above printed is annexed to the complaint and part thereof. The headlines may be disregarded because it appears they were put on after the synopsis was delivered by appellant. That part of the complaint relating to publication in the Eau Claire Leader may be omitted because it was found that the appellant did not cause that publication. The matter inclosed in bracket No. (1) is also separately stated in the same complaint with an innuendo to the effect that it was intended and understood to assert as a fact that the plaintiff had under corrupt influence violated his oath of office. By answer to question 5 of the special verdict the jury found that a person of average comprehension, upon reading these words in connection with the remainder of the synopsis as published, would ordinarily have understood that the plaintiff was accused thereby of having under corrupt influence violated his oath of office. By their answer to question 15 of the verdict they found that this accusation was not substantially true. The matter inclosed in bracket No. (2) was also separately stated in the same complaint with an innuendo to the effect that it meant and was understood to mean that plaintiff had betrayed the trust of the office of district attorney. The jury in answer to question 6 of the verdict found that a person of average comprehension, reading these words in connection with the remainder of the synopsis, would ordinarily have understood therefrom that the plaintiff was accused of betraying the trust of his office as district attorney; and by their answer to question No. 16 of the special verdict found that this accusation was not substantially true. The matter inclosed in bracket No. (3) was also separately stated in the same complaint with an innuendo to the effect that this meant and was understood to mean that the plaintiff was in fact unworthy of public confidence to any extent. The jury in answer to question 8 of the verdict found that a person of average comprehension,

reading these words with the rest of the synopsis, would ordinarily have so understood it, and by their answer to question 18 of the verdict found that this accusation was not substantially true. The matter inclosed in bracket No. (4) was also separately stated in the same complaint with an innuendo to the effect that it meant and was understood to mean that the plaintiff was in fact so base and vile that a self-respecting man could not vote for him. The jury in answer to question 9 of the verdict found that a person of average comprehension would not ordinarily so understand it, and although the question of the truth or falsity of this was submitted to the jury by question 19 of the verdict they did not answer it. The matter inclosed in bracket No. (5) is also separately stated in the same complaint with an innuendo to the effect that it meant and was understood to mean that each of the several charges and matters therein stated were disgraceful facts. The jury by their answer to question 1 of the special verdict found that that part of the matter in bracket No. (5) printed in ordinary type and preceding the italics would by a person of average comprehension, reading the synopsis of the sermon as published, have been understood to accuse the plaintiff of basing his claim to re-election upon the ground that he saved the county money by refusing to prosecute more than one half of the criminal cases which he was elected and paid to prosecute. By their answer to question 11 the jury found that this accusation was not substantially true. By their answer to question 2 of the special verdict the jury found that a person of ordinary comprehension, reading the synopsis in question as published, would ordinarily have understood that the plaintiff was accused thereby of having publicly in the court room apologized for prosecuting a criminal at the bar and declaring his personal disapproval of the law under which the defendant was arraigned. But by their answer to question 12 of the verdict the jury found that it was substantially true that the plaintiff had publicly in the court room apolo-

gized for prosecuting the criminal at the bar. By their answer to question 12½ of the verdict the jury found that it was substantially true that the plaintiff had publicly in the court room declared his disapproval of the law under which the defendant was arraigned. By their answer to question 3 of the verdict the jury found that a person of ordinary comprehension, reading the synopsis, would understand therefrom that the plaintiff, as district attorney in the year 1908, refused to prosecute a considerable number of cases so flagrant that when the judge before whom they were brought declared his intention to continue them the defendants at once pleaded guilty and were fined. By their answer to question 13 of the verdict the jury found that the accusation last stated was substantially true. That part of the synopsis contained in bracket No. (5) and which was found to be true is in italics above. By their answer to the fourth question of the verdict the jury found that a person of ordinary comprehension would ordinarily have understood that the plaintiff was thereby accused of being an officer whose loyalty to the ruling clique of seventy-three liquor dealers was beyond question and whose fidelity to his oath of office was open to grave doubt. By their answer to question 14 of the verdict the jury found that this accusation was not substantially true. The matter inclosed in bracket No. (6) is also separately stated in the complaint with an innuendo in effect charging that it meant and was understood to mean that the plaintiff had in fact and through said corruption betrayed the trust of his said office. The jury found in their answer to question 7 that a person of average comprehension would so understand it, and in their answer to question 17 that the accusation was not substantially true. The matter inclosed in bracket No. (7) is also separately stated in the same complaint with an innuendo to the effect that it was meant and understood to charge that the plaintiff was the vilest of men and that in him vileness was in fact exalted among the sons of men. The

jury by their answer to question 10 of the special verdict found that a person of average comprehension would not ordinarily so understand it, and returned no answer to question 20, which asked whether this charge was substantially true.

With reference to the whole article the jury found by their answer to question 23 that the appellant in person delivered the manuscript of the synopsis to the office of the Daily Telegram on October 27, 1908, and by answer to question 24 that the appellant, when he so delivered said manuscript, had knowledge of the statements therein referring to the plaintiff. The answer to question 32 established that the defendant Granville Ross Pike was not actuated by any ill-will, hostility, bad motive, or malicious feeling against the plaintiff in the publication of the synopsis of the sermon in question. The answer to question 33 found that the appellant, in delivering the manuscript for such publication, was not actuated by any ill-will, hostility, bad motive, or malicious feeling against the plaintiff. For the publication in the Eau Claire Leader, with which the appellant was not concerned, the jury assessed compensatory damages against the defendant Granville Ross Pike, by their answer to question 21 of the verdict, in the sum of $600. For the publication in the Daily Telegram, with which the appellant was concerned as aforesaid by delivering the manuscript for publication having knowledge of its contents, the jury assessed compensatory damages against Granville Ross Pike in the sum of $525. Punitory damages assessed were not allowed, and no question is made concerning the correctness of that ruling. No damages were expressly assessed by the verdict against the appellant, but against the defendant Granville Ross Pike in the form stated, and the defendant was only connected with this by the finding that he delivered the manuscript in question to the newspaper office with knowledge of the statements therein contained referring to the plaintiff.

It is argued that appellant's participation in publication of the alleged libel is not sufficiently established. "Every one who requests or procures another to write, print, or publish a libel, is answerable as though he wrote, printed, or published it himself." Odgers, Libel & S. (5th ed.) 168. "The mere delivery of a libel to a third person by one conscious of its contents amounts to a publication." Id. 165. Instances illustrating the application of this general rule may be found in 25 Am. & Eng. Ency. of Law (1st ed.) 820, 821, 27 Am. & Eng. Ency. of Law (2d ed.) 1056, where a telegraph company is held responsible for publishing a libel in transmitting a telegram from the sender to the person addressed. Also *Monson v. Lathrop,* 96 Wis. 386, 71 N. W. 596; *Peterson v. W. U. Tel. Co.* 65 Minn. 18, 67 N. W. 646. In *Loibl v. Breidenbach,* 78 Wis. 49, 47 N. W. 15, it is held that one who negligently signs a libelous article without knowing its contents and delivers it to the person who wrote it without any direction restricting the use to be made of it, is responsible for the publication thereof by the person to whom it is delivered, where the article shows on its face that it is intended for publication. Participation in publishing a libel is participation in the commission of tort, and the old and well known rule is that all who aid, advise, countenance, or assist the commission of the tort are wrongdoers.

The most serious question raised by the appeal is the claim of qualified privilege on the ground that the plaintiff was a candidate for public office and his official acts and public character open to discussion, and therefore the article in question, so far as it concerns the plaintiff, did not exceed the bounds of fair comment and criticism. The alleged libelous matter is set forth in full in this opinion because we found it impossible by mere description to convey an accurate idea of the nature and contents of the synopsis. It is purely political, such a discourse as one often hears on the stump from politicians or public men during an election campaign. The

authority of Isaiah, Aristotle, and Abraham Lincoln is invoked, and the experience of Athens, Rome, and England drawn upon as a warning against the domination of the seventy-three saloonkeepers in Eau Claire. These seventy-three are the principal objects of attack, but all who adhere to them are also condemned and exposed. In presenting the seventy-three and their adherents for disapproval, the writer, for the purpose of impressing his readers or because of a personal peculiarity, employs some highly rhetorical and extravagant forms of expression. "A deadly exhalation from the regal palaces" of those whom he describes as sovereign lords of Eau Claire, which deadly exhalation is compared to the deadly choke-damp of the mines, is said to asphyxiate the moral sense of the community and paralyze the energies of its administration. Then follows the first alleged libelous statement complained of as above set forth. It does not refer to the district attorney nor to the plaintiff, but to all officials who come under the benumbing influence of this deadly exhalation and under such influence they violate their oaths of office. "The defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo cannot make the person certain which was uncertain before." Newell, Slander & L. (2d ed.) p. 256, § 17. Illustration: If a man wrote that all lawyers were thieves, no particular lawyer could sue him unless there is something to point to the particular individual. *Eastwood v. Holmes,* 1 F. & F. 347, 349. This matter in bracket (1) refers to all officials and does not point to the district attorney or to the plaintiff any more than it does to the county judge, the mayor of the city, or any city or county officer. The matter in brackets (2) and (3) is subject to this same weakness. There is nothing to show that it points to the district attorney more than it does to any other officer,

unless it be the innuendo, which is not warranted by the context. The alleged libelous matter in brackets (1), (2), and (3) not only fails to point to the district attorney more particularly than to any other officer, but is in the nature of an appeal by one elector to the other electors to overthrow the ruling political clique and all who adhere to it. It relates to the fitness for office of those who adhere to the ruling clique and their conduct in office; it imputes no crime to them, it employs no degrading or insulting epithets toward them, but in extravagant language denounces them as derelict in the duties of their office, unfit, unfaithful, etc. This we understand a political stump orator may do, and outside of ethics there is no rule against using the pulpit for a like purpose. It would be absurd to hold it libelous to say of a candidate for office that he was utterly unworthy of public confidence. To maintain that proposition all political arguments are advanced against a candidate. They are sometimes very rambling, remote, and irrelevant, but the law does not undertake to punish the man who sums them up in a single sentence. The district attorney is introduced for the first time in the matter contained in bracket (4). Here we have it that a gang in Chicago similar to the seventy-three Eau Claire saloonkeepers purchased the privilege of plunder, a thing to be obviated by the nonpartisan election of a district attorney on an independent ticket when neither party had provided a candidate for that office for whom a self-respecting man could vote. We do not understand that there was any nonpartisan candidate for district attorney in Eau Claire or that the plaintiff was so described. He simply endeavors to bring himself within the last part of that sentence which states neither party has provided a candidate for the office of district attorney for whom a self-respecting man can vote. The plaintiff was the nominated candidate to the office of district attorney on the Republican ticket, and it may be fairly said that this part of the synopsis describes the plaintiff as a candidate

for whom a self-respecting man could not vote. This is all that is claimed for it in the complaint. The jury negatived any further libelous meaning attempted to be put on this by innuendo, if the innuendo really adds anything to it, and no other meaning was claimed for it on the argument, so we may say this drops out as a support for the recovery.

The matter inclosed in bracket (5) presents more difficulty. Although cast in a single sentence in the synopsis and this sentence set forth separately in the complaint, followed by an innuendo to the effect that it meant and was understood to refer to the plaintiff, and to assert in the form of a climax that each of the several charges and matters were facts, it was separated in the verdict. The jury found that part of it in italics above to be true, the remainder of the sentence not true. That part found to be true contains the most specific and serious accusations in the sentence. The parts found by the jury not to be true are also found by them to accuse the plaintiff of basing his claim to re-election upon the ground that he saved the county money by refusing to prosecute more than half of the criminal cases which he was elected and paid to prosecute. This merely finds that he made claim to re-election upon that ground. The other part of the same sentence was interpreted by the jury to charge the plaintiff with being an officer whose loyalty to the ruling clique of seventy-three liquor dealers was beyond question and whose fidelity to his oath of office was open to grave doubt. Taken in connection with the rest of the synopsis the fair interpretation of this, it seems to us, is that the matter found to be true by the jury formed the basis of the writer's conclusion that the plaintiff was loyal to the ruling clique of liquor dealers and that his fidelity to his oath of office was open to grave doubt. That appears to be an argumentative inference from the fact that he apologized for certain prosecutions, disapproved the law under which they were brought, and refused to prosecute others who nevertheless pleaded guilty and were fined.

The matter in bracket (6) was found by the jury to present to a person of average comprehension, on reading the synopsis, the idea that the plaintiff was accused of having through effluvia of corruption betrayed the trust of his office as district attorney. It does not seem to us to refer to the plaintiff. Its meaning is not very apparent. The writer had just before been discussing candidates for Assembly and for Senate. The article speaks for itself on this point. He wishes the refreshing breezes of a certain ballot to blow away the morally devitalized atmosphere which they have been breathing, and he wishes to replace an effluvia of corruption (which was undermining their moral stamina and familiarizing them with betrayal of trust in high places) by the quickening ozone of righteousness. This is another attempt to break up a sentence into fragments and give an independent meaning to each fragment. The matter in brackets (6) and (7) seems to us to be a sort of a pious peroration closing the argument. It is noticeable that the jury found that that part of this sentence inclosed in bracket (7) would not bear the libelous construction placed upon it by the innuendo in the complaint. Considering the last sentence in the synopsis we think it could not be fairly said that one discussing political questions from the viewpoint of the Reverend Mr. Pike exceeded the bounds of fair comment by indulging in such generalities. This matter in brackets (6) and (7) is not reasonably susceptible of any defamatory meaiing so far as the plaintiff is concerned. Indeed the whole synopsis is directed against the seventy-three liquor dealers and their adherents, including all other public officers who adhere to them or their cause, except where he takes up the district attorney in brackets (4) and (5). The matter contained in bracket (4) having been found by the jury not libelous, the whole case really rests upon the matter contained in bracket (5). If part of this last had not been found true by the jury a very different question would be presented. The occasion being one of

qualified privilege, and the more serious matters in the synopsis, so far as they refer to the plaintiff, having been found by the jury to be true, and those related matters in the same sentence being in the nature of conclusions resting in part or in whole on the matter found to be true, the protection of privilege must be accorded to the appellant. In the law of libel that branch or subdivision of qualified privilege which permits discussion of the relative merits and demerits of candidates for office is not identified with the defense of fair comment and criticism of a book, a play, or other similar thing offered to the public. But the qualified privilege to discuss the relevant demerits of a candidate for office is broader and includes privilege as well as the right of fair comment and criticism.

In libel words are to be understood according to their plain and natural import. Where there is no ambiguity in the language its meaning is for the court to determine. Odgers, Libel & S. (5th ed.) p. 688, par. 6. The court also determines whether the occasion was one affording to the writer a qualified privilege or right of fair comment and criticism. Newell, Slander & L. (2d ed.) p. 391, § 9. The question of malice is for the jury, and also the question of the meaning of the alleged libel when the words used are ambiguous or fairly susceptible of a libelous meaning. The question always is: How did the persons to whom the words were originally spoken or published understand them? In answering this question it is the duty of the jury to weigh all the circumstances of the case, the occasion of speaking, and the relationship between the parties. They should consider the words as a whole, not dwelling on isolated passages, but give its proper weight to every part. . . . The defendant is therefore entitled to have the whole of the alleged libel read as part of the plaintiff's case, and, for the purpose of showing that what he wrote was not libelous and will not bear the construction which plaintiff seeks to put upon it, may give in evidence any

other passages in the same publication which plainly refer to the same matter or which qualify or explain the passage sued on. Newell, Slander & L. (2d ed.) pp. 304, 305, §§ 28, 29.

The scope of questions 32 and 33 of the special verdict is very broad. Neither defendant was actuated by any ill-will, bad motive, or malicious feeling against the plaintiff. The negation of bad motive is equivalent to a finding of good faith, so that we may say it is a verity that the synopsis, such as it is, was published in good faith and without malice. The occasion was one of qualified privilege. The publication was made in good faith and without malice. There was no accusation of crime contained therein and no gibes, taunts, or insulting epithets tending to bring the plaintiff into public contempt or ridicule. The extravagant expressions contained in the publication relating to the manner of performance of official duty and to the qualifications and reliability of the candidates, so far as they applied to the plaintiff, by reason of the finding of the truth of a substantial part of the synopsis and the privilege of the occasion, made no case for recovery against the appellant.

"Every citizen has a right to comment on those acts of public men which concern him as a citizen of the state, if he do not make his commentary a cloak for malice and slander. Those who fill a public position must not be too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties." Newell, Slander & L. (2d ed.) p. 577, § 15.

It is said in *Buckstaff v. Viall,* 84 Wis. 129, 54 N. W. 111, that a privileged communication is a fair comment by a public journal upon a matter of public interest. But gibes, taunts, and contemptuous and insulting phrases are not a fair

comment nor privileged by any principle of law. It was said by Chief Justice DIXON in *Calkins v. Sumner,* 13 Wis. 193, that to support an action for verbal or written slander it is necessary that the charges should be false and that they should be maliciously made.

"When the *prima facie* case of privilege has been thus made by proof that the communication was made in the course of a public duty, from a sense of public duty, and with an honest belief in its truth, it becomes the duty of the plaintiff, as in other cases of communications conditionally privileged, to prove actual malice by some facts tending to prove a malicious or guilty motive." *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913.

"The exemption from liability for words spoken on a privileged occasion is not the same privilege recognized in the law as pertaining to confidential communications, as between attorney and client and other like confidential relations, but they are privileged upon the ground that they furnish no ground of action for alleged injury." *Schultz v. Strauss,* 127 Wis. 325, 106 N. W. 1066.

It is contended by respondent's counsel that even if the publication was privileged in Eau Claire county, in which the electors were interested in the qualifications of the candidate, evidence shows that the newspaper had some circulation outside of that county and therefore there was an excessive publication within the rule of *Buckstaff v. Hicks,* 94 Wis. 34, 68 N. W. 403. This rule relating to excessive publication applies more strictly to cases in which privilege is claimed on the ground that the communication was private and confidential and from one having an interest in, or duty relating to, the subject of the communication to another having a like interest or duty. But it is also applied, as shown in *Buckstaff v. Hicks, supra,* to cases where the interest is more public although not generally public. When we come to the application of the rule to the instant case it will be found there are no charges in the synopsis to which it applies. It cannot apply to those which do not designate the plaintiff, nor to

those which the jury found not ordinarily susceptible of the libelous meaning attempted to be put on them by the innuendo, nor to those which are found to be true, nor to those which are mere argumentative inferences from the latter. If we assume that some expressions in bracket (5) of the synopsis not found to be true would have been actionable but for the privilege of discussing the relevant demerits of a candidate for office, then the alleged excessive publication was merely incidental, and coupled with the finding of good faith and lack of malice gave no right to recover damages, within the rule of *Coleman v. MacLennan,* 78 Kan. 711, 98 Pac. 281, 20 L. R. A. N. S. 361; *Hatch v. Lane,* 105 Mass. 394; *Shurtleff v. Stevens,* 51 Vt. 501.

By the Court.—Judgment reversed, and the cause remanded with directions to render judgment for appellant.

BARNES, J. (*dissenting*). By question 4 of the special verdict the jury found that a person of average comprehension, upon reading the synopsis of the sermon as published, would have ordinarily understood that the plaintiff was accused in said sermon of being an officer whose loyalty to the ruling clique of seventy-three retail and wholesale liquor dealers mentioned in the sermon was beyond question and one whose fidelity to his oath of office was open to grave doubt.

Question 5 of the special verdict was as follows:

"Would a person of average comprehension, upon reading the words 'officials under its benumbing influence violate their oaths of office,' and considering these words in connection with the remainder of the synopsis of said sermon as published, ordinarily have understood that plaintiff was accused by said words in said sermon of having, under corrupt influence, violated his oath of office?"

To which question the jury answered "Yes."

By the answer to the fifteenth question the jury found that it was not substantially true that the plaintiff had under corrupt influence violated his oath of office.

By its answer to question 14 the jury found that it was not substantially true that the loyalty of the plaintiff to the ruling clique of seventy-three retail and wholesale liquor dealers was beyond question, or that his fidelity to his oath of office was open to grave doubt.

I think that the jury was warranted in answering the fourth, fifth, fourteenth, and fifteenth questions as they did. It was charged that the loyalty of the plaintiff to the ruling clique of seventy-three liquor dealers was beyond question and not only that his fidelity to his oath of office was open to grave doubt, but that he in fact violated such oath by reason of the corrupt influence exercised over him by the saloon-keepers in question. These charges were false but not maliciously made. I cannot assent to the doctrine that in the absence of malice any person can make and publish of and concerning a candidate for office untrue charges such as the foregoing and escape responsibility for them on the ground of "qualified privilege." Candidates for office should not be treated as pariahs who can with impunity be charged with grave crimes, albeit those charges are in somewhat general terms. They are just as harmful as though they were made specific enough to satisfy the demands of a criminal pleading. It would be a misnomer in fact and in law to call the article "fair comment," in view of the fact that the jury found that the most flagrant charges contained therein were untrue.

The respondent moved to modify the mandate of this court by striking therefrom the direction to render judgment in favor of the appellant and substituting a direction to the circuit court to permit and take such further proceedings in the cause, consistent with the opinion of this court, as to said circuit court may seem proper and according to law, "and in such other particulars as may be essential to the preservation of the rights of the respondent."

The motion was denied, with $25 costs, on January 7, 1913.

DARLINGTON and another, Respondents, vs. J. L. GATES LAND COMPANY, Appellant.

October 10, 1912—January 7, 1913.

Action: Tort or contract? Vendor and purchaser of land: False representations: Failure of title to timber: Measure of damages: Interest: Evidence: Weight and sufficiency: Constructive fraud: Merger in covenants of deed: When fraud actionable.

1. In an action *ex delicto* based on false representations by the vendor of land to the effect that the purchaser would get title to the timber thereon, the measure of damages is the difference between the market value of the land as it was and the market value as it would have been had the representations been true.
2. If the action were *ex contractu* on the covenants of warranty in the conveyance, the measure of damages would be such proportion of the whole consideration paid as the value of the timber the title to which failed bore to the value of the whole tract purchased, with interest.
3. Where, in such a case, the lowest measure of damages applicable to either form of action was adopted, defendant was not prejudiced by a failure to determine whether the action was in tort or upon contract.
[4. Whether or not misrepresentations upon a sale of land, amounting only to constructive fraud, merge in the covenants for title in the deed, so that an action *ex delicto* will not thereafter lie, not decided.]
5. It is sufficient to constitute actionable fraud that the false representations made were a material inducement toward entering into the contract and they need not have been the sole cause or inducement. Language used in *Shaw v. Gilbert*, 111 Wis. 165, explained.
6. The question being as to the value of certain timber removed from land sold to the plaintiff, and the testimony being conflicting not only as to values but as to the kinds and quantities of timber, the jury was not bound to accept and rely solely upon the testimony of any one witness, in assessing damages, nor to make a mere computation based upon any particular testimony.
7. Where the title fails to timber represented as going with land sold, and the damage to the vendee is the market value of the timber at the time of the sale, interest on such value from that time is properly allowed.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Action to recover damages for failure to acquire certain timber standing on lands purchased by plaintiffs from the defendant and which it is alleged the defendant falsely and fraudulently represented belonged to it at the time of sale and was included in the purchase of the lands. The case was here before on appeal from an order overruling a general demurrer to the complaint, and is reported in 142 Wis. 198, 125 N. W. 456, to which reference is made for a fuller statement of facts. The jury found (1) that when plaintiffs were negotiating with defendant for the purchase of the lands in question, J. L. Gates, the president of the defendant company, stated to *W. L. Darlington* that if plaintiffs purchased said lands they would become the owners of the timber thereon and that the defendant had not sold any of said timber; (2) that J. L. Gates made said statement to induce plaintiffs to make the purchase; (3) that the plaintiffs relied on the truth of said statement and were induced thereby to purchase the lands; (4) that Gates made said statement not knowing the same to be false so far as it related to the lands covered by the William Diamond contract; (5) that Gates made said statement knowing the same to be false so far as it related to the lands covered by the Charles Wood contract; (6) that the plaintiffs, considering their intelligence and experience by ordinary attention to their business, under the circumstances shown in this case, ought to have relied on said statement and accepted said statement as true without doing more than the testimony in this case disclosed they did to ascertain the truth or falsity of such statement; (7) damages as to the lands covered by the William Diamond contract in the sum of $1,047.07, plus interest $384.45—total $1,431.52; and (8) damages as to the lands covered by the Charles Wood contract in the sum of $378.35, plus interest $138.92—total

$517.27. From a judgment in favor of the plaintiffs entered upon such verdict the defendant appealed.

For the appellant there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

For the respondents there was a brief by *W. H. Stafford,* attorney, and *T. J. Connor,* of counsel, and oral argument by *Mr. Connor.*

The following opinion was filed October 29, 1912:

VINJE, J. The case was tried on the complaint before this court in *Darlington v. Gates L. Co.* 142 Wis. 198, 125 N. W. 456, and it was there held that it sufficiently alleged a cause of action for fraud and also one for a breach of the covenants of warranty in the deed. Claim is now made by the defendant that the action is one for fraud, and that as to the Diamond lands, since no actual fraud was shown, the representations merged in the covenants of the deed and there is nothing to support the judgment. The question of whether this is an action *ex delicto* or *ex contractu* is purely academic. True, as stated by counsel for defendant, if the action is *ex delicto* then the measure of damages is the difference between the market value of the land as it was and the market value as it would have been had it been as represented, while if the action is *ex contractu* it would be such fractional part of the whole consideration paid as the value of the timber at the time of purchase bore to the whole purchase price, with interest, as announced on the former appeal. 142 Wis. 198, 204, 125 N. W. 456, citing *Docter v. Hellberg,* 65 Wis. 415, 27 N. W. 176. But "such fractional part of the whole consideration paid as the value of the timber at the time of purchase bore to the whole purchase price" is nothing more nor less than the value of the timber at the time of purchase, and that was exactly the measure of damages applied in this case. Every witness who testified to the difference between the market value of the

land as it was with the timber standing thereon and its market value without the timber, said that the difference in market value was the value of the timber removed, and that only was taken into consideration. The value of the timber removed, with interest, was the only element that made up the damages assessed. No lower measure of damages could have been applied under either kind of action, and defendant, therefore, would have fared no better had the action been expressly labeled *ex contractu*. So it becomes unnecessary to decide whether or not misrepresentations amounting only to constructive fraud merge in the covenants of title, and the question is reserved for future consideration and determination.

Error is alleged because the court instructed the jury:

"In order to answer this question [the third one] in the affirmative, you must find from the evidence that the plaintiffs believed said statement to be true, and that said statement constituted a material inducement for them to purchase the land. It is not necessary, however, that the plaintiffs should have relied exclusively upon such statement as an inducement to the plaintiffs to purchase the land, if such statement exerted a material influence upon their minds, inducing them to purchase."

It is claimed that in order to constitute actionable fraud the false representations must have been the sole cause or inducement that led to the contract or agreement. Such is not the law of this state. It has been repeatedly held that if the representations constitute a material inducement towards entering into the contract it is sufficient. *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Benolkin v. Guthrie,* 111 Wis. 554, 87 N. W. 466; *Hurlbert v. T. D. Kellogg L. & M. Co.* 115 Wis. 225, 91 N. W. 673; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Post v. Roberts,* 127 Wis. 605, 106 N. W. 1099. The language used in *Shaw v. Gilbert,* 111 Wis. 165, 185, 86 N.

W. 188, "A false statement relied on, and without which the transaction would not have been made, constitutes legal deceit, although it may not have been the sole and only motive or consideration moving the defrauded party thereto," may be susceptible of the inference that it would not constitute legal deceit if the transaction would have taken place had it not been made. But that such is not its true construction is readily perceived when reference is had to other adjudications in this court wherein it is held that if the representations constitute a material inducement and are relied upon, that is sufficient. The rule is thus stated in *Farrar v. Churchill,* 135 U. S. 609, 615, 10 Sup. Ct. 771:

"The representation must be in regard to a material fact, must be false, and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate, and material."

We find no error in the instruction to which exception is taken.

It is urged that the damages assessed are higher than any evidence in the case warrants. It is true the assessment is slightly higher than the testimony of any one single witness produced by plaintiffs would support. But there is evidence on behalf of plaintiffs which sustains the assessment. Four kinds of timber were removed from plaintiffs' lands, namely, basswood, pine, hemlock, and ash. The testimony of the witnesses varied somewhat as to the price per thousand feet of the different kinds of timber testified to by them, but the total value of the timber, based upon the highest scale and the highest market price thereof testified to, would exceed the amount of damages assessed by the jury. The assessment, therefore, is not as high as it might have been made and still be supported by the testimony. The jury is not compelled to

accept, and rely solely upon, the testimony of any one witness in assessing damages, or merely to make a computation based upon any particular testimony. *Merrill v. Nightingale,* 39 Wis. 247; *Churchill v. Price,* 44 Wis. 540.

It is also urged that the court erred in allowing interest upon the market value of the timber from the time the contract was entered into. This court has held "that there are cases for breach of contract, and cases sounding in tort, where the damages are wholly unliquidated, but where they may be fixed by known and reasonably certain market values or other definite standards, where interest is to be allowed from the time of the breach or the commission of the injury." *J. I. Case P. Works v. Niles & S. Co.* 107 Wis. 9, 17, 82 N. W. 568. See, also, *Gross v. Heckert,* 120 Wis. 314, 97 N. W. 952. Here the damage to plaintiffs was the market value of the timber at the time it was removed. Such value could be found by known and reasonably fixed market values or other reasonably definite standards, and the court properly allowed interest from the time of the date of the land contract when plaintiffs became the equitable owners of the lands. *Krakow v. Wille,* 125 Wis. 284, 103 N. W. 1121. At that time the evidence shows that both Wood and Diamond were in possession of their respective tracts of land on which they had bought the timber and had commenced the cutting thereof.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, and the following opinion was filed, on January 7, 1913:

VINJE, J. A rehearing is asked because of the following alleged errors in the former opinion: (a) The statement that the case was tried on the complaint before the court in *Darlington v. Gates L. Co.* 142 Wis. 198, 125 N. W. 456. It was, so far as any question material to the decision was concerned. There had been a slight amendment as to occu-

pancy not affecting any question decided, and it was deemed safe to omit to mention such immaterial amendment. Perhaps we are now satisfied we erred in so believing. But it was and still is harmless error. (b) The rule of damages, if the action was *ex contractu,* was stated to be "such fractional part of the whole consideration paid as the value of the timber at the time of the purchase bore to the whole purchase price," instead of "to the value of the whole tract purchased," as stated in *Semple v. Whorton,* 68 Wis. 626, 32 N. W. 690; *Docter v. Furch,* 91 Wis. 464, 65 N. W. 161; and *Gates v. Parmly,* 93 Wis. 294, 318, 66 N. W. 253, 67 N. W. 739. Unfortunately the case was barren of any evidence showing the value of the whole tract purchased except the purchase price, and the court contented itself with expressing the rule in terms applicable to the case in hand, if *ex contractu,* and followed it up with the remark that the measure of damages stated was nothing more nor less than the value of the timber at the time of purchase. Counsel is in error in saying that the court considered the rule of damages the same whether it was an action for fraud or on contract for breach of warranty. What the court said was that defendant was not prejudiced by a failure to determine the nature of the action because the lowest measure of damages applicable to either was adopted, namely, the market value of the timber removed. Had the action been one *ex delicto,* a higher measure of damages might have been proper under other evidence; it could not have been lower under any evidence. (c) Claim was made in the original brief that the damages assessed by the jury for the removal of the timber on the Wood lands exceeded any value thereof shown by the evidence, and this table was given:

5,800	feet	pine	at	$5	per	M	$29.00
2,100	"	ash	"	"	"	"	10.50
26,860	"	basswood	"	"	"	"	134.30
75,930	"	hemlock	"	2	"	"	151.86
13,630	"	windfall pine	"	3	"	"	40.89
Total							$366.55

The jury assessed the value at $378.35. This claim is now repeated. The above table gives the scale testified to by Mr. Tonnoncour and gives his values except as to the "windfall pine." The price of $3 per thousand for it given in the table was testified to by Mr. Grandmaitre. On page 40 of the printed case Mr. Tonnoncour's testimony as to the value of the timber on the Wood lands is as follows: "Pine averaged 18 or 20 to the thousand, worth $5 per thousand; ash about 15 logs to the thousand, worth $5 per thousand; basswood about 15 logs to the thousand, worth $5 per thousand. Value of stumpage about $5. Hemlock about 21 logs to the thousand, value $2 per thousand stumpage."

It will be noticed that the value of every item in the above table, except windfall pine, is given by name by Mr. Tonnoncour, and, in addition, there is the item, "Value of stumpage about $5." This was taken to refer to windfall pine, the only item not specifically mentioned by the witness. In fact, it was the only item to which it could refer, for the others are given by the identical name in the table. So the statement in the opinion that the value of the timber based on the highest scale and the highest market price thereof testified to would exceed the amount of damages assessed by the jury seems to have some basis of fact to rest upon.

LOEHR, Respondent, vs. DICKSON, Appellant.

October 12, 1912—January 7, 1913.

Vendor and purchaser of land: Strict foreclosure of contract: Redemption: Concealment of vendor, preventing payment or tender: Extension of time: Evidence: Unsupported verdict: Appeal: Costs for printing: Striking brief from files: Determination of cause: Counterclaim.

1. In an action to recover damages, based on defendant's alleged fraudulent concealment of himself whereby plaintiff was prevented from paying or tendering the amount necessary to redeem certain lands in compliance with the terms of a judgment of strict foreclosure of a land contract, it is *held*, contrary to findings by the jury, that there was no evidence tending to show that defendant ever concealed himself or rendered a tender impossible or that plaintiff used reasonable diligence in an effort to find the defendant.
2. Plaintiff having alleged and the jury having found that a third person had paid him $70,000 for his rights and interest in the property covered by the land contract, a part of which sum he was ready and willing to pay to defendant to redeem the land, the evidence as to such payment and as to the existence of such third person, tending to show that he was a myth, is discussed, and it is suggested that the finding of the jury in that regard might properly have been set aside in the interest of justice.
3. A conversation in which, on August 23d, the last day for redemption, at the request of a person acting for plaintiff, defendant agreed to call at plaintiff's office on the afternoon of the next day and settle the matter up, might at most be held to amount to an agreement to extend the time for redemption until the afternoon of August 24th and for a sufficient length of time thereafter to enable the plaintiff to call on the defendant and make a legal tender to him, when he found that defendant did not keep the agreement to call at his office, but could not be construed as amounting to an agreement to extend such time from August 23d to August 28th.
4. Appellant's printed case and brief in this case being of unnecessary length and failing to comply with the rules of this court, no costs for the printing thereof are allowed.

5. A brief, "the great part of which can only be characterized as buffoonery," is stricken from the files and no costs allowed for the printing thereof.
6. Recovery upon a counterclaim is denied by the mandate in this case, there having been no finding of damages thereon in the trial court, and the record upon appeal not showing that defendant was entitled to recover.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

In the year 1902 plaintiff contracted to buy certain property of the defendant, designated as Spring Bank, for $53,000. Plaintiff paid $2,000 in cash on the contract and later made other payments. To secure another payment he conveyed to the defendant certain land in Nebraska, valued at $2,000, as collateral security, and also deeded outright to the defendant certain other real estate. Plaintiff was unable to meet his payments as they fell due under the contract of sale and the defendant commenced a foreclosure action, in which judgment of strict foreclosure was rendered in February, 1905, which judgment was reversed by this court January 9, 1906.

This action was brought by the plaintiff to recover damages from the defendant resulting from the defendant's concealing himself so that plaintiff, within the time limited, could not comply with the terms of the judgment entered in accordance with the mandate of this court.

On the trial of the case the jury returned the following verdict:

"(1) Did Clarence R. Smith pay and turn over to plaintiff, *Oscar Loehr,* on or before August 23, 1906, $70,000 in purchase of the rights and interest of plaintiff in the Spring Bank property? *A.* Yes.

"(2) Was plaintiff, on and before August 23, 1906, able, ready, and willing to pay defendant the amount due to redeem Spring Bank, according to the judgment of the circuit court of Waukesha county, entered February 23, 1906? *A.* Yes.

"(3) If you answer the second question 'Yes,' then did plaintiff make reasonable effort to make or tender payment of the amount due to defendant, on and before August 23, 1906? *A.* Yes.

"(4) If you answer the second and third questions 'Yes,' did *David Dickson* conceal himself from plaintiff so as to render such payment or tender by, or on behalf of, the plaintiff, *Oscar Loehr,* impossible to be made on and before August 23, 1906? *A.* Yes.

"(5) Was the time for payment of the proper amount extended by *David Dickson* on or about August 23, 1906, for a few days? *A.* Yes.

"(6) If you answer the fifth question 'Yes,' was payment of the proper amount tendered by *Oscar Loehr* and refused by *David Dickson* within such extended time? *A.* Yes.

"(7) If you answer the fifth question 'Yes' and the sixth question 'No,' then was plaintiff, during such extended time and down to and including August 28, 1906, able, ready, and willing to pay defendant the said amount due the defendant? *A.* Yes.

"(8) If you answer the seventh question 'Yes,' then did plaintiff, during such extended time and down to and including August 28, 1906, make reasonable effort to make or tender payment of the said amount to defendant? *A.* Yes.

"(9) If you answer the seventh and eighth questions 'Yes,' then did *David Dickson* conceal himself from plaintiff so as to render such payment or tender impossible to be made by, or on behalf of, the plaintiff, *Oscar Loehr,* during such extended time and down to and including August 28, 1906? *A.* Yes.

"(10) Did defendant, *David Dickson,* on August 23, 1906, agree with Richard Hedrick, acting for plaintiff, *Oscar Loehr,* to come to the office of the plaintiff on August 26, 1906, and to close the transaction at that time and place? *A.* Yes.

"(11) Did J. E. Wildish, for and in behalf of the defendant, on August 24, 1906, offer to the plaintiff to perform the contract on the part of the defendant? *A.* No.

"(12) If you answer the eleventh question 'Yes,' did the plaintiff, upon such offer, state to said Wildish that he was not ready? *A.* No."

The parties stipulated that the court should determine from the evidence and assess the amount of damages which the plaintiff was entitled to recover, if entitled to recover anything on the verdict, and accordingly the court made the assessment of damages, the amount awarded being $12,872.15 damages, together with the costs in the action, amounting in all to $13,005.30. The defendant was further directed by the judgment to reconvey to the plaintiff, by good and sufficient deed containing covenants of warranty against the acts of the defendant, the Nebraska lands which had been theretofore conveyed to said defendant as collateral security for the payment of one of the instalments due upon the contract. From this judgment the defendant appeals.

J. E. Wildish, for the appellant.

For the respondent there was a brief by *Harper & McMynn,* and oral argument by *R. N. McMynn.*

The following opinion was filed October 29, 1912:

BARNES, J. The defendant in this action brought an action against the present plaintiff in the year 1904 to foreclose a land contract. A judgment of foreclosure was entered in the circuit court, by the terms of which the defendant was allowed but ten days from the entry of the judgment in which to redeem. On an appeal from such judgment this court held that the time for redemption was unreasonably short and reversed the judgment with direction to enter a new judgment allowing the defendant six months from the date of entry thereof in which to redeem. This case is reported, *Dickson v. Loehr,* 126 Wis. 641, 106 N. W. 793. On February 23, 1906, judgment was perfected in accordance with the mandate of this court. Redemption was not made within six months from February 23d. After the period of redemption had expired the present action was brought to recover damages against the defendant because the latter had fraudulently concealed himself so that it was impossible for the

plaintiff to find him and make the necessary tender of the amount which the judgment required should be paid in order to entitle the plaintiff to a conveyance of the premises and personal property covered by the land contract. The amended complaint alleged ability, readiness, and willingness to pay, the fraudulent concealment of the defendant so that payment was impossible, and a sale of the premises by the plaintiff for $9,868.76 more than was necessary to pay to redeem from the judgment, and demanded judgment for damages in the sum of $12,068.76 in the aggregate. A demurrer was interposed to this complaint which was sustained by the circuit court. The order sustaining the demurrer was reversed on an appeal to this court, and this appeal is reported, *Loehr v. Dickson,* 141 Wis. 332, 124 N. W. 293. This court held in substance that it was plainly the intention of the pleader to state a cause of action in tort, and that the complaint did not state a good cause of action in tort. It further held, however, that the defendant was under a contractual obligation not to secrete himself so as to render it impossible for the plaintiff to find him and make the necessary tender, and that inasmuch as the complaint contained sufficient averments to show such obligation and a breach thereof, the complaint stated a good cause of action on contract. After the reversal of the order in question, a jury trial was had which resulted in a judgment against the defendant for $13,005.30.

The issues tendered by the amended complaint which was before this court on demurrer were much narrower than those litigated on the trial. That complaint set forth that *Dickson* kept in concealment until the last day on which redemption could be made, when he was found by an agent of the plaintiff who was searching for him, and that defendant thereupon agreed to call at plaintiff's office on the following day to settle the matter up, but that instead of doing so he went into hiding so that plaintiff could not find him during the remainder of the month. It was further set forth that the purchaser from

the plaintiff thereupon demanded back the $70,000 which he had paid plaintiff on account of the purchase and thereafter plaintiff was unable to secure the $60,131.24 necessary to redeem.

On the trial plaintiff testified that he and the purchaser, one Clarence R. Smith, did in fact find the defendant on August 28th in one of the railway depots in Milwaukee, and that he tendered the necessary amount to redeem and defendant refused to accept the tender on the ground that it came too late, and that immediately thereafter Smith demanded and received back the $70,000 he had paid plaintiff for a good title to the property and departed from Milwaukee and had not been heard from since. It is also claimed that there was testimony tending to show that the defendant extended the time for making the tender for a few days from August 23d, and the complaint was amended after the parties had rested to conform to the proofs above referred to.

The material issues in the case were: (1) Was plaintiff able and willing to pay the amount necessary to redeem prior to August 24, 1906? (2) Did defendant conceal himself so as to render tender or payment impossible? (3) Was the period of redemption extended beyond August 23d? (4) If so, was a tender made within the period covered by the extension? and (5) Did defendant conceal himself so as to prevent a tender within the period covered by the extension?

The jury found that there was such a person as Clarence R. Smith and that he had paid plaintiff $70,000 for the property covered by the land contract referred to, and that plaintiff was ready, willing, and able to pay the $60,131.24 necessary to redeem on and before August 23, 1906. These findings are supported by the evidence of the plaintiff and by that of the witnesses Scharel, Mueller, and Hedrick, and there is some corroboration of their evidence by other witnesses. Notwithstanding this array of witnesses, it is seldom that a case comes to this court which presents so many ear-

marks of having been established by perjured testimony as does the one before us. It requires an abiding faith in the integrity of witnesses to believe that the mysterious and elusive Dr. Clarence R. Smith was not a myth invented to meet the necessities of the case if plaintiff was to stand any show of recovery. The recondite H. H. Hayward involved in *Dorwin v. Hagerty,* 137 Wis. 161, 118 N. W. 799, seems to have found a counterpart in Dr. Smith.

It is not our purpose to enumerate with much detail the various considerations which tend to show that Smith was a dummy rigged up for the occasion. We do not find it necessary, in order to do substantial justice in this case, to say that he did not exist or that he did not pay $70,000 to the plaintiff.

The plaintiff testified that in 1901 he met Dr. Smith several times in the lobby of a hotel at Vancouver, British Columbia, and that they rode together on a train from there to St. Paul, and that Dr. Smith seemed to be very much interested in sanitariums. Plaintiff did not make his contract with defendant until 1902. He further testified that Smith came to Milwaukee and called on him in 1902 and again in 1903 and went out to see the property covered by the contract with defendant. Smith was next accidentally and opportunely met on the streets of New York about February 21, 1906, when the plaintiff was returning from a six months' trip to Europe. In New York they talked about the sanitarium and then came to Chicago together. Smith stayed over one night in Chicago and came to Milwaukee the next morning, and apparently returned to Chicago the next night and made a pilgrimage back to Milwaukee the following day. He seemed to have had a great aversion to Milwaukee hotels, because, even as early as 1903, on the occasion of his visit to Milwaukee, he apparently went to Chicago to spend the night, returning the following day. Plaintiff testified that during the visit to Milwaukee in February, 1906, Smith took an option on the property for

$70,000, paying $1,000 therefor. Some time in June he wrote plaintiff that he would come to close the deal. Plaintiff thinks this letter was written from Winnipeg, but the letter was not preserved. The option which plaintiff gave Smith was drafted by the latter, and he apparently forgot that he was a Canadian and gave his place of residence as the "*State* of Manitoba." In his examination under sec. 4096, Stats., plaintiff said that this option was given in July instead of in February. On the same examination plaintiff testified that on July 5th Smith paid him something over $60,000 on the purchase, taking back as security a note secured by a trust mortgage. On the trial he said the money was paid on July 16th. During none of these important negotiations was any lawyer consulted or employed by either of the parties. Then the search for *Dickson* was prosecuted with unremitting vigor, but was confined to looking for him where he did not happen to be. According to the evidence Smith was in Milwaukee most of the time between July 5th and August 28th, but his aversion to Milwaukee hostelries continued. He apparently preferred to spend his summer nights in Chicago or at or near Racine, and it was plaintiff's belief that he did not favor Milwaukee to the extent of spending a single night there. Neither did plaintiff know of a single hotel any place where Smith had registered, unless it might be at the Waldorf Astoria in New York, and he did not know whether Smith ever registered there or not. The alleged search for *Dickson* continued down to August 21st, but he had apparently vanished. Notwithstanding this and the fact that the time to redeem would expire on August 23d, Smith paid to plaintiff the balance of the $70,000, or nearly $9,000 in excess of the amount theretofore paid. Although plaintiff kept a bank account, he neither deposited the first payment of over $60,000 nor the second one of about $9,000. It was not claimed that there was any necessity for keeping the second amount handy so as to be prepared to tender it to *Dickson*. Plaintiff testi-

fied on his examination under sec. 4096 that he kept the first payment in a satchel from July 5th until August 28th, which was in his office during the day and at his home at night, and that he had the money with him all the time. On the trial he testified that the first payment was not made until July 16th, and that most of the time he kept the money in a safe in the house of the witness Scharel. Plaintiff further testified that both payments were made in currency. No real attempt was made to find *Dickson,* although, according to plaintiff's evidence, he was interested in finding him to the extent of about $9,000. The evidence on this point will be discussed later. After August 28, 1906, Dr. Smith vanished as completely as Charlie Ross. It would seem that a doctor who had a penchant for sanitariums and who had enough of this world's goods to carry $70,000 around with him ought to be easily located even in such a city as Winnipeg or Vancouver. If the doctor had passed away or had removed, others should have been found who knew him or knew of him. The story was so extraordinary that the court might well look to the plaintiff to furnish this proof. It would be difficult to establish the negative, because plaintiff was either unfortunate in not knowing more about his friend or cautious in not committing himself as to any particular place where the doctor resided. Then, too, the doctor, for a man of means, was as careless about intrusting a large sum of money to a stranger as that stranger was about handling and caring for it after he got it. Just why the doctor advanced $60,000 before *Dickson* was found, so that a tender could be made to him, and why he advanced plaintiff $9,000 more practically without security on August 21st, two days before the period of redemption expired, when he and plaintiff had been diligently looking for the defendant without success since July 5th, are circumstances that call for some better explanation than has been attempted. We have given but a brief outline of the evidence tending to show the mythical character of Smith and do not

find it necessary to pursue this subject farther, as we do not hold that the first and second findings of the jury should be set aside because not supported by any credible evidence. We think the case was one where the trial court might well have exercised the broad discretion vested in it and set aside the verdict on the ground that the promotion of justice demanded such action, even though no other reason was apparent to the court for taking such course. Courts sit for the purpose of seeing that justice is secured by litigants. In carrying out this important function they should see to it so far as they can that litigants are not rewarded for committing the crime of perjury, by favorable judgments.

We now come to the question whether other findings of the jury essential to sustain the judgment rendered are supported by any evidence whatever. The fourth finding will first be considered. By it the jury found that the defendant concealed himself so as to render tender or payment by the plaintiff impossible. The character of the evidence offered to support this finding and which it is claimed does support it may be briefly summed up:

The defendant's home was in Milwaukee. The plaintiff testified that during the months of July and August, 1906, he wrote numerous letters properly addressed to the defendant at his street number, that they were properly mailed, and that in them he informed the defendant that he was ready to pay up the amount required by the judgment and asked the defendant to meet him for that purpose, and that none of these letters were returned; that plaintiff also drafted a number of notices to the same effect and either carried them personally or sent them by messenger to defendant's house and that the same were pushed under the door of the house; that plaintiff made some sixteen trips to the house during the time stated, for the purpose of seeing him and arranging a settlement; that Smith made numerous trips for the same purpose, as did Scharel, Mueller, and Hedrick; that inquiries were made of a woman

who lived near *Dickson's* house, as to his whereabouts, and that she was unable to give the desired information; that inquiry was also made of a saloonkeeper in the vicinity and he replied that he did not know *Dickson;* that plaintiff attempted to call *Dickson* by telephone at his house a number of times; that some one in the interest of plaintiff made inquiry at the Pabst building, where defendant formerly had an office; that an attempt was made to get Wildish, the defendant's attorney, by telephone, but the party seeking to communicate with him was unable to do so because Wildish was out at the time of the inquiry; that a representative of the plaintiff called at Wildish's office on the 21st or 22d of August for the same purpose and again found that he was out, and finally that plaintiff on the 3d of July offered a messenger boy $2 if he would find *Dickson* for him. It was further testified that no answer was received to the various letters or notices and that none of the letters were returned, although there were directions thereon for return in case of nondelivery. It was also testified that one night when the plaintiff attempted to locate *Dickson* a light was observed in the house and that it was turned out when plaintiff attempted to get in.

Notwithstanding this testimony, we do not think there was a scintilla of evidence in the case which either showed or tended to show that *Dickson* was in hiding or that he concealed himself so as to make a tender impossible. It is rather strange that these frequent visits should be made to a house that was closed and to a house that was obviously unoccupied. It is established beyond dispute that *Dickson* closed his house in May or the fore part of June and kept the same closed until October, except as he occasionally might have visited it when he came to Milwaukee; that he with his family moved out on the Spring Bank property near Okauchee, twenty-seven miles from Milwaukee, and lived there continuously and openly from June to October; that *Dickson* had occasion to go to Milwaukee frequently to attend to his business, and did go as fre-

quently as twice a week; that he collected rents from some thirty tenants during his trips there, and regularly made deposits in the Second Ward Savings Bank, and frequently visited a safety deposit company in which he had a couple of safety deposit boxes, and that occasionally he stayed over night in Milwaukee. There is not a shred of testimony to show that *Dickson* left Milwaukee for the purposes of concealment or that he did anything whatever to conceal himself during the months of July and August, or that he had any reason to believe that plaintiff intended to redeem when he moved to Spring Bank. There were valuable buildings on the Spring Bank property, which, by the way, was the property plaintiff had contracted to buy. By the terms of that contract the defendant had the right to the possession of the property until certain payments were made, which the plaintiff did not make. The plaintiff knew that the defendant's son had occupied the Spring Bank property formerly at least, and made no effort to ascertain whether he was still residing there. The plaintiff knew that one Mrs. Siemens was renting one of the buildings on the property for a summer cottage and knew her and her husband well, and made no inquiry from either of them as to where *Dickson* was. The plaintiff knew that Wildish was the attorney for *Dickson* in the litigation between them. The evidence showed that Wildish was at his office during the months of July and August, except as he might be away for an occasional day or so, and practically made no effort to ascertain from him where his client was, at least up to the 21st or 22d of August, and apparently very little if any effort was made then. Plaintiff knew that Judge Neelen lived in close proximity to *Dickson's* house, and he testifies that he asked the judge on one occasion whether *Dickson* was at home, but he did not take the trouble to ask him if he knew where *Dickson* was. No inquiry was made of *Dickson's* neighbors as to his whereabouts except as above stated. The plaintiff consulted no attorney as to the proper means of

finding *Dickson,* and neither did he consult any member of the sheriff's office or of the police force. The evidence as to *Dickson's* whereabouts was not only given by himself and members of his family, but by a number of wholly disinterested witnesses. There was practically the same evidence of hiding that might be shown in reference to any other resident of Milwaukee who lived out at one of its suburbs during the summer months. It is a little strange that plaintiff and his agents should make so many trips to a house that was closed up and unoccupied and do practically nothing else to find the defendant, when, according to plaintiff's testimony, so much depended on his being able to locate him. The only circumstance we have been able to find in the testimony at all tending to support the claim of the plaintiff is the fact that he said he wrote numerous letters and received no answer thereto. *Dickson* denied receiving any such letters. He was under no legal obligation to answer the letters, although it would have been a courteous thing for him to have done so had he received them. But *Loehr* knew at a very early date in July that his letters were not being answered, and still he persisted in sending letter after letter and notice after notice to the same place, and continued to make trip after trip day after day to the same house, which he knew to be closed up and unoccupied. He made no inquiries as to *Dickson's* whereabouts of any one who was likely to know, except it was of the woman who lived near him, and did nothing to ascertain his whereabouts that was at all calculated to produce results. On this state of the record we are unable to see where there is any evidence that it was impossible for plaintiff to make the tender because the defendant was in concealment.

We say, therefore, that this fourth finding of the jury must be set aside as not supported by any testimony. What has been said in reference to the fourth finding also applies to the third finding, by which the jury said that the plaintiff made reasonable efforts to tender payment of the amount due to the

defendant on or before August 23, 1906. We think it would have been a very easy matter for the plaintiff to find *Mr. Dickson* if he wanted to find him.

We next come to the consideration of the fifth finding of the jury, by which it was determined that on or about August 23, 1906, the defendant extended the time of redemption for a few days. Two different transactions are relied upon to support this finding. It is argued that the witness Hedrick found *Dickson* on the 23d of August and served a demand upon him on behalf of the plaintiff for a deed of the premises and satisfaction of a mortgage thereon and the assignment of insurance policies and certain other things which it is unnecessary to enumerate, and that at the time of serving such demand Hedrick requested the defendant to call at the plaintiff's office on the afternoon of the following day to settle the matter up, and that defendant agreed to do so but failed to keep his promise. *Dickson* denies making the appointment to meet the plaintiff, but says he did tell Hedrick that he would take the matter up with his attorney. In discussing this finding of the jury we shall assume that the testimony of Hedrick is true wherever there is any conflict between the witnesses, because the jury evidently believed his statement as to what conversation took place. There was no statement in the notice served that plaintiff was ready or willing to pay over the money, but perhaps it might be fairly implied from the demands contained in the notice, which, by the way, was not signed, that plaintiff was ready to pay. Construing this conversation most favorably to the plaintiff, it might be held to amount to an agreement to extend the period of redemption until the afternoon of August 24th and for a sufficient length of time thereafter to enable the plaintiff to call on the defendant and make a legal tender to him when he found that defendant did not keep his agreement to call at his office. But we fail to see how that conversation can be construed as amounting to an agreement to extend the time of redemption

from August 23d to August 28th, when the plaintiff insists that he actually made the tender. While the jury found that plaintiff was in concealment not only up to the 23d of August but also thereafter and until the 28th of August, we hold that there is no testimony in the record which shows that he was ever in concealment a single day or a single hour. So we dismiss the claim that the alleged agreement between Hedrick and *Dickson* on the 23d of August amounted to or was an agreement to extend the time of payment for a few days or until August 28th.

The second ground on which plaintiff seeks to support this finding of the jury arises out of an alleged transaction between Wildish, the defendant's attorney, and the plaintiff on the 24th of August. After Hedrick left the plaintiff's demand with *Dickson* on August 23d, the latter went to the office of Wildish and found that he was out and left the notice there with a memorandum in reference to it. Wildish testified that on the following morning he found the demand, started to draw some of the necessary papers in reference to the transfer, and then went over to *Loehr's* office and told him that the abstract would have to be carried down to date and that possibly a new abstract would have to be provided and a mortgage would have to be satisfied, and that it might take a few days within which to complete the transaction, and that he then told *Loehr* that *Dickson* was ready and willing to perform on his part and asked *Loehr* if he was ready to pay, and that *Loehr* told him he was not. *Loehr* does not deny this conversation except by saying that Wildish did not call at his office and that he did not have any such conversation with him on August 24th or at any other time. Counsel for respondent argues that the jury had a right to believe Wildish and to disbelieve *Loehr* and that it evidently did so as to this transaction, and that inasmuch as Wildish was *Dickson's* attorney he had a right to bind his client by extending the time within which payment might be made a sufficient length of time to

enable the parties to get the papers ready. The trouble with the contention for the respondent is that the jury did not believe Wildish but did believe *Loehr*. By the eleventh finding it found that Wildish did not on August 24, 1906, offer to perform the contract on the part of the defendant, and by the twelfth finding it found that the plaintiff did not say to Wildish that he was not ready to perform. Now it may be said that the twelfth finding of the jury is supported by the testimony of other witnesses than the plaintiff, and that therefore it does not necessarily follow that the jury believed *Loehr's* evidence to be true when it answered that question. This, however, cannot be said of the answer to the eleventh question. Wildish testified positively that he told *Loehr* the defendant was ready to perform. There is absolutely no evidence in the record to dispute the testimony of Wildish that he did say so, except that of *Loehr* to the effect that Wildish was not in his office and that he did not have any conversation with him. There being evidence in the record which would warrant the jury in answering the eleventh question as it did, we must assume that it followed such evidence when it made its answer and that it found *Loehr's* testimony to be true. Its answer to the fifth question was evidently given on the assumption that the conversation between Hedrick and *Dickson* warranted such a finding.

We therefore hold (1) that there was no evidence in the case tending to show that *Dickson* ever concealed himself or rendered it impossible for the plaintiff to find him and make a tender to him, or that plaintiff used reasonable diligence in an effort to find the defendant; (2) that there was no agreement made either on the 23d or on the 24th of August, or at any other time, to extend the time of payment to August 28th, when the alleged tender was made; (3) that defendant had the right to refuse the tender made on August 28th, if one was made, because the same was not made within the time prescribed by the judgment. It follows from

these conclusions that no cause of action was proved by the plaintiff.

The printed case contains 909 pages of printed matter aside from a rather poorly prepared index. Nearly all of the evidence is printed by giving the questions and answers. Everything material and immaterial, important or trifling, is printed. Several hundred pages are devoted to irrelevant matter that could in no way be helpful to this court on any aspect of the case. There was no necessity for preparing a case to exceed 250 pages in length. This allowance is liberal. The appellant's brief contains 219 pages and gives no orderly presentation of the issues or of the things relied on by appellant to support his contentions. The lack of concentration and the rambling method of argument pursued in the brief rendered it necessary for the court to carefully read over the mass of relevant and irrelevant testimony printed in the case, in order to get a clear understanding of the issues between the parties and the evidence bearing on such issues. All the material questions raised by appellant could be fully treated in a fifty-page brief. If all the cases that come before this court were prepared and presented in the way this one has been, the court could not begin to keep up with its work. Rule 44 of this court is neither ornamental nor innocuous. Under it no costs will be allowed appellant for printing. *Gerbig v. Bell*, 143 Wis. 157, 126 N. W. 871, and cases cited.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint. No costs for printing will be allowed.

The following opinion was filed December 10, 1912:

PER CURIAM. At the close of the testimony in this case the defendant was permitted to interpose a counterclaim in which he sought to recover damages in the sum of $2,000 from

the plaintiff. This counterclaim was not referred to in the opinion of the court. The appellant now moves the court for judgment on his counterclaim for the amount claimed therein with interest, and also asks this court to determine that the action is one in equity and to direct a taxation of costs in the trial court in favor of the appellant as in equitable actions.

The counterclaim was not treated in the opinion filed, because there was no finding of damages by the court or the jury, and because this court was of the opinion that the record did not show that the defendant was entitled to recover. The effect of the mandate in the case was to deny recovery on the counterclaim, and this is the effect which the court intended it should have.

For the present we will assume that the trial court will follow the law in the matter of awarding costs. The motion of the appellant is denied, with $10 costs.

The following opinion was filed January 7, 1913:

PER CURIAM. In support of his motion for a rehearing in this case the respondent has filed a brief which, though it has not convinced us of error, is, at least, entitled to be met by serious argument.

Instead of so meeting it, the appellant has served and filed a so-called brief consisting of nineteen pages of printed matter, the great part of which can only be characterized as buffoonery. An occasional play of wit is refreshing and sometimes illuminating even in a legal argument, but a brief is properly a field for the exercise of the highest reasoning powers and not for the exploitation of literary vaudeville.

The serving and filing of such a brief can only be considered as trifling with counsel and with the court. It will be stricken from the files and no costs will be taxed for printing it.

The appellant's brief is stricken from the files, and the motion for a rehearing is denied without costs.

HOHNBACH and others, by guardian *ad litem*, Appellants, vs. HOHNBACH and others, Respondents.

November 1, 1912—January 7, 1913.

Wills: Construction: Nature of estate devised: Death without issue.

After devising a life estate in all his property to his wife during widowhood, a testator gave the remainder in equal shares to his children "or to the child or children of any deceased child or children, by right of representation," but further directed that "in case any of my said children shall die without leaving lawful issue them surviving, but leaving a husband or wife them surviving, as the case may be, the share or shares which are hereinbefore given to any of my said children shall revert to my other surviving children, or the child or children of any such surviving child or children, by right of representation." The widow died a few days after the testator. *Held*, that the words "in case any of my said children shall die" referred to a death occurring during the lifetime of the testator or of the life tenant, and that upon her death the surviving children of the testator and the issue of his deceased children, if any, took an absolute estate in fee.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

On February 24, 1908, Robert T. Hohnbach died, leaving a will which was thereafter duly admitted to probate. His widow died on February 28, 1908, four days after his death. The plaintiffs herein are the minor grandchildren of the testator, and by their guardian this action is brought for the construction of the will, their contention being that the fee to the real estate is vested in them and that the children of the testator receive but a life estate or conditional fee. The defendants, the children of the testator, contend that, having survived the testator and his widow, they take an absolute fee in the land, and that the death of the devisees referred to in the will means their death prior to the death of the testator or prior to the death of the widow. The controversy arises

over the first and fifth paragraphs of the will, the material parts of which are as follows:

"First. After the payment of the expenses of my last sickness, funeral charges, expenses of administration, and all of my just debts and liabilities, I do hereby give, devise and bequeath unto my beloved wife, Lina Hohnbach, for and during the term of her natural life and widowhood, all of my property and estate of whatsoever kind and nature, and wheresoever the same may be, and in case she shall again marry, I direct that she shall take nothing under this will, but shall be entitled to all her statutory provisions."

"Fifth. All of the rest, residue and remainder of my estate, I do hereby give, devise and bequeath to all of my children, including my said daughter *Clara,* in equal shares, or to the child or children of any deceased child or children, by right of representation, but I do hereby direct that in case any of my said children shall die without leaving lawful issue them surviving, but leaving a husband or wife them surviving, as the case may be, the share or shares which are hereinbefore given to any of my said children, shall revert to my other surviving children, or the child or children of any such surviving child or children, by right of representation."

The trial court found in favor of the defendants, and from a judgment entered in accordance with such finding plaintiffs appeal.

For the appellants the cause was submitted on the brief of *Emil Lenicheck,* guardian *ad litem.* He cited, among other cases, *Littlewood's Will,* 96 Wis. 608, 71 N. W. 1047; *Eggleston v. Swartz,* 145 Wis. 106, 129 N. W. 48; *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659.

For the respondents the cause was submitted on the brief of *Lenicheck, Robinson, Fairchild & Boesel.* They argued, among other things, that a life estate having been created by this will, the death of any of the devisees during the widow's lifetime would have divested them of their share and their children would have taken, by substitution, the parents' share. Death of the devisees here means death at any time

prior to the widow's death. If the gift is after a life estate, or a time is appointed for payment, the words "in case of death" refer to death at any time before the vesting in possession, whether before or after the death of testator. 30 Am. & Eng. Ency. of Law (2d ed.) 709; *Matter of Denton,* 137 N. Y. 428, 433, 33 N. E. 482; Page, Wills, § 676.

BARNES, J. This appeal presents but a single question. The appellants insist that the words "In case any of my said children shall die without leaving lawful issue them surviving" apply and extend to a death at any time. Respondents contend that they were intended to apply to a death occurring during the lifetime of the testator or of the life tenant. If appellants are correct, the children after the death of their mother took a life estate only. If respondents are correct, they took the fee.

After devising a life estate to his wife during widowhood, the testator proceeds in very plain and apt language to dispose of the remainder of the estate. He says: "All of the rest, residue and remainder of my estate, I do hereby give, devise and bequeath to all of my children . . . in equal shares." Had the will stopped here there could be no doubt that the remainder in fee was devised to the children who survived the widow, and unless this plain and unambiguous language is modified by what follows, the circuit court construed the will correctly. Next the testator provided that in case any of his children died leaving issue, such issue was to take the share of the deceased child of the testator. There is no inconsistency between this and the preceding clause. He then proceeds to provide for another contingency, to wit, the death of any of his children without issue but leaving a husband or wife, as the case might be. He desired that the interest of such child should go to his or her brothers and sisters or their issue, rather than to the surviving husband or wife of the deceased child. There is certainly nothing in

the language used in this part of the will which in express terms overrides the preceding provision disposing of the remainder of the estate.

The testator, by appropriate language, first disposes of the remainder left after the estate carved out for the widow has ceased to exist. At the death or marriage of the widow all the residue and remainder was to go to the children. It seems quite apparent that the language following this clause was intended to apply to conditions as they existed when the actual distribution of the residue came to be made. If at that time one of the children had died leaving issue, such issue should take the share of the parent. If one of the children died leaving a husband or wife but no issue, the surviving children or their issue were to take such share rather than one who was not related by blood to the testator. What the testator has said plainly means this: At a certain time all of my estate is to absolutely vest in my children. If in the meantime any of them die leaving issue, such issue shall take what would be the parent's share had such parent survived, but if any of my children die leaving a husband or wife but no issue, I want my remaining children or their issue to take the interest of such deceased child or children.

Such we think is the obvious meaning of the language used. Where the intent is reasonably clear, precedents are of little value. They cannot be successfully invoked to override intent. The only thing in connection with this will which would indicate any different intent on the part of the testator is the provision that if any of the children died without issue leaving a husband or wife, such husband or wife was precluded from sharing in the estate. This clearly indicated that until the time came when the remainder was to come into the possession and enjoyment of the children, only blood relations were to participate in the division, but it does not indicate that the absolute title was not intended to pass when the children became entitled to the possession of the estate.

The case which comes nearest to the one we are considering, and in which it was held that only a life estate was devised to a child, is *Korn v. Friz,* 128 Wis. 428, 107 N. W. 659. This case recognizes the rule that a "gift to one with limitation to others in case of his death, or death without issue, ordinarily is to be construed as applying only to the condition of things prior and up to the death of the testator." Citing *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073. A reference to the opinion in the *Patton Case* will show that this rule is supported by an abundance of authority. The *Korn Case* was at best a close one, and therefore one in which no doubt some weight was attached to the decision of the circuit judge. Furthermore, much significance was given to the following clause found in the will: "It being my desire that said real estate shall be kept and retained by persons of my own blood." We have no such declaration in the will we are presently considering, and nothing to indicate that the testator had any purpose to preserve his estate to those of his own blood after his own death and that of his wife. The decision in the *Korn Case* went far enough and should not be extended. A reading of the will in that case leaves the mind in doubt as to what the testator intended, with the probabilities favoring an intention to give a life estate only to the son. The will in the case now before us, on the contrary, carries conviction that the testator intended that the children should take an absolute estate after the termination of the life estate given to the widow. The intent being ascertainable with a reasonable degree of certainty, the function of the court is to carry it into effect and not to search for technical rules to defeat it.

By the Court.—Judgment affirmed.

MARSHALL and SIEBECKER, JJ., dissent.

DANIELSON, Respondent, vs. GARAGE EQUIPMENT MANUFACTURING COMPANY, Appellant.

November 2, 1912—January 7, 1913.

Appealable orders: Pleading: Contract for services, etc.: Sufficiency of complaint: Causes of action not stated separately: Remedy.

1. An order of the circuit court affirming an order of the civil court of Milwaukee county overruling a demurrer, is appealable under subd. 3, sec. 3069, Stats.
2. In an action on contract to recover a balance claimed to be due for services of plaintiff and moneys advanced in the erection of a factory building for defendant, the complaint (set out substantially in the opinion) is *held*, on demurrer, to be sufficient.
3. Where a complaint sets up two causes of action, pleaded together and not separately stated, the remedy is by motion, not by demurrer.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The defendant interposed a demurrer to plaintiff's complaint in the civil court of Milwaukee county. That court overruled the demurrer, and upon appeal to the circuit court the order of the civil court was affirmed, and an appeal from the order of the circuit court taken to this court. The following is the order of the circuit court from which the appeal to this court was taken:

"The appeal of the defendant from the order of the civil court for Milwaukee county overruling the defendant's demurrer to the plaintiff's complaint having been brought to a hearing before the court upon the return herein, after hearing Messrs. Flanders, Bottum, Fawsett & Bottum, attorneys for the appellant defendant, and Charles T. Hickox, attorney for the respondent, and after having duly considered the questions involved and being now fully advised in the premises, upon the motion of plaintiff's attorney,

"It is ordered and adjudged: That the order of the civil court in this action overruling the demurrer of the defendant

to the plaintiff's complaint, be, and the same hereby is, affirmed, and the clerk of this court is hereby directed to return to the clerk of said civil court the said action and the papers belonging thereto, for further proceedings according to law."

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara.*

Chas. T. Hickox, for the respondent.

KERWIN, J. A preliminary question was raised in this court as to the appealability of the order of the circuit court. Briefs upon that question have been filed by counsel for both parties, in which they agree that the order is appealable. This court is of the opinion that the order is appealable.

On the merits it is argued by appellant that the complaint fails to state a cause of action. The complaint is upon contract. It charges substantially that plaintiff was to procure and provide as agent of defendant, at defendant's expense, all material and labor required for the construction of a factory building in accordance with plans and specifications prepared by an architect, which building was estimated to cost $20,000 including plaintiff's commission; that the plaintiff by the terms of the contract was to furnish his own apparatus, machinery, and tools, employ the labor, and purchase all material required in performance of the work; that should the building exceed $20,000 and not exceed $20,500, plaintiff's compensation was to be $2,000; that if the cost should be less than $20,000, plaintiff should be paid in addition to $2,000 twenty per cent. of the amount so saved to the defendant; that if plaintiff should be called upon to perform any additional work not specified in plans and specifications, he should receive for such additional work ten per cent. on the cost of the additional material and fifteen per cent. on the cost of additional labor, in excess of $20,500.

The complaint further alleges that plaintiff entered upon the work and that numerous changes were made in the plans

and specifications, whereby the proposed building was enlarged and strengthened, necessitating the expenditure of a larger amount of money than was estimated, and plaintiff was required to provide extra material to the amount of $8,986.28 and extra work to the amount of $2,122.02, "and that the factory finally built, completed, and equipped for said defendant under the charge of said plaintiff, by reason of said changes, equipment, and improvement of grounds, cost $31,277.83, or $11,277.83 more than the estimated cost of the building as originally planned;" that under the terms of the contract the plaintiff became entitled to compensation for extra material in the sum of $587.63, extra labor $318.30, in addition to $2,000 for cost of building as originally planned, and that by reason of the premises defendant became indebted to plaintiff in the sum of $2,896.93 and also in the sum of $5,614.08 for cash advanced by plaintiff in behalf of defendant and at defendant's special instance and request, making the total indebtedness to plaintiff from defendant $8,511.01, no part of which has been paid except $7,125.18, and that there is due the plaintiff, over and above all credits, $1,385.83 with interest from August 12, 1910.

The appellant contends that the complaint attempts to state two causes of action, neither of which is sufficient in facts. It will be seen that the complaint does not purport to state two causes of action as required by the Code. The whole matter is set forth as one cause of action. If the complaint sets up two causes of action, pleaded together, not separately stated, the remedy is by motion and not by demurrer. *State v. C. & N. W. R. Co.* 132 Wis. 345, 112 N. W. 515; *Sentinel Co. v. Thomson,* 38 Wis. 489; *Nichol v. Alexander,* 28 Wis. 118; *State ex rel. Rice v. Chittenden,* 107 Wis. 354, 83 N. W. 635; *McCall Co. v. Stone,* 124 Wis. 572, 102 N. W. 1053; *Gooding v. Doyle,* 134 Wis. 623, 115 N. W. 114.

We have set out quite fully the substance of the material parts of the complaint, and treating it as one cause of action,

as we must upon demurrer, we think it states a cause of action under the liberal rules of pleading which obtain in this state. Secs. 2668, 2829, Stats. (1898); sec. 3072*m*, Stats. (Laws of 1909, ch. 192); sec. 2649*a*, Stats. (Laws of 1911, ch. 354); *Schmidt v. Joint School Dist.* 146 Wis. 635, 132 N. W. 583; *St. Croix Con. C. Co. v. Musser-Sauntry L., L. & Mfg. Co.* 145 Wis. 267, 130 N. W. 102; *Bruheim v. Stratton,* 145 Wis. 271, 129 N. W. 1092; *Hall v. Bell,* 143 Wis. 296, 127 N. W. 967; *Bannen v. Kindling,* 142 Wis. 613, 126 N. W. 5; *Bieri v. Fonger,* 139 Wis. 150, 120 N. W. 862; *Prentice v. Nelson,* 134 Wis. 456, 114 N. W. 830; *Foeller v. Heintz,* 137 Wis. 169, 118 N. W. 543; *Andresen v. Upham Mfg. Co.* 120 Wis. 561, 98 N. W. 518; *Tucker v. Grover,* 60 Wis. 240, 19 N. W. 62; *Sentinel Co. v. Thomson,* 38 Wis. 489; *Messmer v. Block,* 100 Wis. 664, 76 N. W. 598.

We deem further discussion unnecessary. The facts stated in the complaint are sufficient upon demurrer, and therefore the order appealed from must be affirmed.

By the Court.—The order is affirmed.

GERKE, Plaintiff in error, vs. THE STATE, Defendant in error.

November 2, 1912—January 7, 1913.

Criminal law: Arson: Evidence: Sufficiency: Good reputation: Weight: Review on writ of error.

1. One convicted of crime has not only the right to the solemn judgment of the trial court on the question whether his guilt was sufficiently proven, but upon writ of error he has the right to demand the deliberate opinion and judgment of this court upon the same question.
2. The evidence in this case (stated in the opinion) is *held* insufficient to sustain the conviction of a person charged with burning in the nighttime the dwelling house of another.

3. In such a case the facts that defendant had for years led the industrious and exemplary life of a reliable and law-abiding citizen, and that by his honest labor he had accumulated some property, do not prove his innocence; but a reputation of that kind carries much weight, especially when the evidence of guilt is doubtful and circumstantial.

ERROR to review a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

F. F. Groelle, attorney, and *Robert J. MacBride,* of counsel, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, and *John J. Healy,* district attorney, and oral argument by *Mr. Healy* and *Mr. Jackson.*

WINSLOW, C. J. The plaintiff in error, hereinafter called the defendant, was convicted under sec. 4399, Stats. (1898), of burning the dwelling house of Henry Detjen in the nighttime when there were human beings therein, and was sentenced to ten years' imprisonment at Waupun.

A number of exceptions to the rulings of the court upon the trial are urged as grounds for reversal of the judgment, but it must be sufficient to say that we have found no serious or prejudicial error in any of the rulings complained of, and that if there were no other questions in the case the judgment would be at once affirmed.

The important question in the case, and one to which we have devoted careful attention, is the question whether there was sufficient evidence to sustain a verdict of guilt. As has been previously said by this court, the prisoner has the right not only to the solemn judgment of the trial court on the question whether his guilt was sufficiently proven, but upon writ of error he has the right to demand the deliberate opinion and judgment of this court upon the same question. *Lonergan v. State,* 111 Wis. 453, 87 N. W. 455. After diligent study of the record before us, we have come to the con-

clusion that the evidence of guilt was insufficient in this case. Without attempting to review the evidence exhaustively in this opinion, we shall attempt to state its general purport sufficiently to make plain the reasons for the conclusion reached.

The fire in question occurred at about 2 o'clock a. m. October 14, 1911. The building burned was a frame building, consisting of a country saloon, dance hall, grocery store, and dwelling house combined, which was kept and owned by one Henry Detjen, a man sixty-four years of age, and occupied by himself and his family as a dwelling house. The building was situated on the northeast corner of the crossing of two country roads in the county of Manitowoc, about five miles south of the city of that name. One of the roads ran due north and south and the other due east and west.

Detjen had bought the forty-acre farm on the corner of which the building was situated in 1903 for $6,000. He had erected some additional barn buildings thereon. The burned building was erected in 1900 at a cost of about $4,500, contained property of the estimated value of $1,500, and was insured for $2,900.

The defendant was an unmarried German, twenty-seven years of age at the time of the trial, *i. e.* in February, 1912. He came to this country six years before the trial of the case, and came directly to Neillsville, Wisconsin, where for about five years he worked at his business or trade, which was that of a stone mason, sometimes going to work in the woods in the winter. Five representative business men of Neillsville were put on the stand, and testified to the good character and reputation of the defendant during this period. It also appears that he was thrifty and made some accumulation of property. In August, 1911, he came to Manitowoc county to the vicinity of the burned building to make investigation (as he says) concerning the worth of a second mortgage on property in that vicinity, which mortgage he had taken on the sale of property at Merrillan Junction. At this time he

learned that a saloon and dance-hall building on the southeast corner of the same four corners, immediately across the highway south of the burned building, was for sale. One Charles Eau Claire then owned the building with five acres of land on which it stood and one-half acre of land on the northwest corner of the cross-road on which stood an unused blacksmith shop and shed. There was a mortgage of $3,000 on the property to a brewing company. This saloon had been built about nine years previously and had been occupied successively by several proprietors and was empty for quite a period. Eau Claire had been in occupation for a little more than a year. The defendant purchased it for the agreed consideration of $5,000, of which $3,000 was represented by the mortgage aforesaid, $1,800 by two second mortgages on other property, which defendant transferred to Eau Claire as cash, and $200 which defendant agreed to pay to one Sommers. Eau Claire had an unexpired saloon license which was issued in the previous July, and in order to escape taking out a new license some sort of a paper writing was executed by the defendant and Eau Claire to the effect that the defendant was operating the place as agent or lessee of Eau Claire. The saloon and dance hall was lighted by kerosene lamps, of which there were some fourteen in all, and the defendant cooked his meals on a kerosene stove. There was a fifty-gallon barrel of kerosene oil nearly full in the cellar of the saloon when the trade was made. The defendant lived in the building and occupied one of the rooms as his sleeping room, and his dog was in the room with him at night.

There is no evidence of any ill-feeling between Detjen and the defendant at any time prior to October 8th,—in fact it appeared that the defendant bought his groceries, or a part of them, at Detjen's store. On the morning of October 8, 1911, at about 6 o'clock, as Detjen came out of his house in the morning he discovered a small fire burning on the outside at the northwest corner of his house, and smelled kerosene.

He put out the fire with the assistance of his son Reinhold. The testimony tends to show that on the morning of October 14th, at about 2 o'clock, Detjen's wife was awakened by smoke, that she called her husband and her two children, Reinhold and Ella (both adults), that Detjen went out and found another fire burning at the northwest corner of the house and found a pile of kindling there saturated by kerosene. The fire had already got into the studding of the house, and it was impossible to put it out, although efforts were made to do so. Reinhold and Ella soon came out, and they claim that they saw the defendant standing in the doorway of his saloon fully dressed and that he made no effort to help them. Neighbors soon began to arrive and efforts were made to save property. The night was still. The defendant's saloon being just across the road from the burning building was in danger of catching fire, and the defendant with the assistance of some of his neighbors threw water upon the windows and also upon the roof to prevent the flames from breaking out. The defendant admits that he stood at his door and saw a man and a woman, who were probably Reinhold and Ella, outside of the Detjen building, but says that he had a suit of gray underclothing but no shoes on, and that he had just been wakened by his dog jumping on the bed. He claims that he ran to the middle of the road, and that either Reinhold or Ella then hollered, "It does no good any more, get the stuff out," and then he started up the road eastward to the house of one Mahoskey, forty rods distant, and called to him several times, but could not rouse him; that he then ran back and went to the telephone and rang it several times but got no answer, and then went and dressed himself, and when he came out the neighbors had begun to come, and he, with some of the neighbors, began to make the necessary efforts to save his own building. As to the ringing of the telephone, the defendant seems to be absolutely corroborated by the witness Herman Carstens, called by the state, who lived

one half mile west of the corners and was on the same telephone line with *Gerke,* who testified that he was roused by his telephone ringing several times, but he did not answer because he thought he would be fooled, but that he got up some two or three minutes later, and saw the fire which suddenly became much brighter. Carstens further testified that when he got to the fire he saw *Gerke,* and *Gerke* told him that he rang him up and asked him why he didn't answer the phone, and he told him he thought some one was fooling again. Mahoskey also testified that he heard some indistinct calls in front of his house just before he was alarmed by another neighbor, and thus the defendant seems to be corroborated in another particular. That the defendant was very much excited and made a strenuous effort to save his own building and property is very certain.

There was testimony to the effect that the ground was saturated with kerosene at the place where the fire started and fire was seen burning on the ground in spots running from the northwest corner of the burned building about halfway across the road toward the unused blacksmith shop owned by the defendant, but there was no proof that there were any traces of oil in the blacksmith shop nor that any oil had ever been in the building.

It was shown that the attempt to burn the house on October 8th caused considerable talk in the neighborhood, that the defendant on the day before the second fire said to one of the neighbors who was in his place that they (the Detjens) "ought to watch,—it is just a week ago now, that son-of-a-gun might come around again."

It was also shown that the defendant stated to another neighbor some time before the fire that the business was going slow, that if there was only one saloon it would be better, and that he wasn't satisfied that he had made $50 since he had been there. It was also shown that he called on a brewing company in Manitowoc about the 1st of October and

asked them whether they didn't want to buy a saloon; also that he said to the sheriff after the fire, when the sheriff told him that he thought he (*Gerke*) burned the building, "Well if I did I will have to take it."

There was testimony to the effect that one evening after the first fire the defendant came into Detjen's saloon and told Detjen that his (Detjen's) wife had been talking with another woman outside and that she had said to the other woman that the fire came from his (*Gerke's*) side of the road; and that she must take that back; that Detjen then called his wife and she explained that she was talking with a Mrs. Repke about the fire, and in reply to a remark by Mrs. Repke to the effect that it was funny that that man should light that, and that other man that is here before he is gone, that's funny whoever could have done it, she replied, "Well, we can't tell, because we haven't seen it,—we don't know." After this explanation *Gerke* appears to have been satisfied, bought a glass of beer and went home.

It is believed that the foregoing statement comprises all of the significant facts tending in any way to inculpate the defendant.

It appeared that there was no insurance ever taken out by the defendant on his building, but that the mortgagees had $2,500 of insurance on the building, of which defendant was informed, and there is some claim by the state the defendant thought that this insurance was for his benefit, but this seems not very well substantiated. There were fifteen gallons of oil found in the barrel in defendant's basement after the fire. No oil had been bought by him since he started business with something less than fifty gallons, but the testimony seems ample to account for the missing amount by the use thereof in the lamps in the saloon, the dance hall (where two dances had been held), and the kerosene stove which he used daily to cook his meals. No smell of kerosene was found on the defendant's clothes, and no pails or receptacles were found in

his house which bore any indications of having been used to carry kerosene. The testimony on the part of the state tends to show that a large quantity of kerosene was spilled on the ground at the corner of the building and between the middle of the highway and the building. It seems impossible that there could have been fifteen gallons left in the defendant's barrel after the steady use thereof for nearly two months, if the great quantity which the evidence tends to show must have been used in starting the two fires had also been taken therefrom.

In the state's brief the following facts are claimed to be clearly established, and also to justify the conclusion that the defendant fired the building, namely: that the fire was deliberately set by some person with kerosene oil and kindling wood; that the defendant's building was not injured; that the parties were rivals in business and that it was generally known that both saloons could not pay, and that defendant was not making a success of the business; that he was deeply in debt, thought he had $2,500 insurance, stated that the business was slow and that if there was only one saloon it would be better, and tried to sell the property without avail; that he was conducting a saloon without license under a subterfuge agreement made to evade the excise law; that he was the sole occupant of his premises, had kerosene and kindling therein, and that the kerosene used in the fire came from the direction of his unused blacksmith shop; that on the previous day he said that Detjen had better watch out, as it was just a week since the first fire and the same person might come back to complete the job; that defendant was dressed and outside his building near the time of the starting of both fires; that he offered no aid, but was very solicitous about protecting his own property and that of others which was in no danger; and lastly, that the defendant did not definitely deny his guilt when the sheriff charged him with it.

It will be seen at once that there is not one item of direct

proof against the defendant from start to finish. There does not seem to have been any enmity or bitterness of feeling. The remarks made by defendant are fully as susceptible of an innocent as of a guilty construction. It is true there was a business rivalry, although there is no evidence tending to show that the rivalry had caused a single harsh word or thought on either side. It is entirely possible, of course, that the desire to do away with a business rival under such circumstances might be sufficient to induce some depraved minds to commit a crime like this, which when done in the night with people asleep in the building is little short of murder in its depravity. But here we meet another fact: it seems to be proven beyond dispute that the defendant for five years led the industrious and exemplary life of a reliable and law-abiding citizen, and that by his honest labor he accumulated some property. It is true that this fact does not prove innocence, but a reputation of this kind carries much weight, especially when the proof is doubtful and circumstantial. While there are some circumstances in this case tending to cast suspicion upon the defendant, we have been unable to conclude, even after giving to the opinion of the trial judge that weight to which it is entitled, that these circumstances are of sufficient weight to justify the conviction of a man whose previous life is shown to have been without reproach. Having reached this conclusion, we can do no less than to set aside the judgment and award a new trial.

By the Court.—Judgment reversed, and action remanded for a new trial. The warden of the state prison will deliver the plaintiff in error into the custody of the sheriff of Manitowoc county, who will hold him in custody to await the further order of the court.

NEACY, Respondent, vs. CITY OF MILWAUKEE and others, Appellants.

November 19, 1912—January 7, 1913.

Municipal corporations: Powers: Construction of lighting plant: Use of streets: Diversion of fund: Certificate of convenience and necessity, when required: Issuance of bonds: Injunction: Taxpayer's action: Pleading.

1. A taxpayer's action may be maintained to restrain the illegal issuance of municipal bonds or the diversion of public funds to an unlawful purpose.
2. Where, in such an action, plaintiff claims that municipal bonds are invalid, the facts showing invalidity should be specifically and positively alleged.
3. Where a city was authorized to use the proceeds of bonds in the construction of a municipal electric light plant, the expenditure of a part of such proceeds to install machinery at the city's refuse incinerator for the purpose of using surplus steam there being wasted, such machinery to constitute an auxiliary plant and a unit of the main electric light plant, and to be used primarily for lighting purposes, was not an unlawful diversion of the fund, even though, incidentally, power generated in such auxiliary plant and not needed for lighting was to be used to operate the city's flushing station, it being intended that the value of the power so used should be charged to the sewerage fund and credited to the lighting fund.
4. Express statutory authority having been conferred upon cities by sec. 926—11, Stats. (1898), to light streets, public buildings and grounds, it necessarily follows that they might use the streets for the accomplishment of such purpose.
5. Where a city issued bonds, purchased a site, and expended money toward the construction of a municipal electric light plant before the passage of the public utility act (Laws of 1907, ch. 499) and before there was in existence in such city a plant operated under an indeterminate permit, no certificate of convenience and necessity from the railroad commission is requisite to enable it to go on and complete such plant and use the streets to distribute the electricity generated thereby.
6. Under ch. 75, Laws of 1911, which legalizes under certain conditions invalid bonds issued by cities for the purchase or construction of electric lighting plants, and authorizes the use of the proceeds for the purpose intended, a city which has complied with such conditions is not required to obtain, in addition, a certificate of convenience and necessity from the railroad commission.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

This action was brought by the plaintiff, a taxpayer of the city of *Milwaukee,* against the defendant city and its officers to restrain them from constructing and operating a municipal electric light and power plant, using money and issuing and selling bonds for that purpose.

Between 1902 and 1908 the defendant city took proceedings for the authorization and issue of bonds for the construction of a municipal electric lighting plant before the first suit (*Neacy v. Milwaukee,* 142 Wis. 590, 126 N. W. 8) was commenced. One hundred and fifty thousand dollars of these bonds were sold and $60,000 of the proceeds thereof invested in a site for a plant. This issue of bonds was subsequently declared void by this court. *Neacy v. Milwaukee,* 142 Wis. 590, 126 N. W. 8. Other money was spent before the above decision, in addition to the $60,000 for the land for a site, by way of expense for engineering, plats, and plans and specifications for machinery.

In May, 1911, the legislature of the state of Wisconsin passed ch. 75, Laws of 1911 (sec. 927—19*a,* Stats.), whereby provision was made to validate the bonds theretofore held invalid by this court, and the defendant city took the steps indicated by the law for the purpose of validating the bonds, and other steps were taken to carry on the proposed work.

Application was made for a temporary injunction, which resulted in the making of the following order by the court:

"That said defendants, and each and every of them, be and are hereby, until the trial and final determination of this action by this court, strictly restrained and enjoined from doing any act or thing looking to or in connection with the making or entering into any new contract or incurring any new or additional liability for the construction, erection or purchase of any municipal light or power plant, or any part thereof, or any equipment or machinery therefor, or for machinery, equipment or plant as described and referred to in the complaint herein in Exhibit A thereto annexed.

"That said defendants, and each and every of them, be and are hereby, until the trial and final determination of this action by said court, strictly restrained and enjoined from diverting or transferring any further, other or different sums of money from that certain fund of the city of *Milwaukee* known as the municipal lighting fund, as referred to and described in the complaint herein, and from drawing or signing any city order for the payment of any money, or from paying any money or sum of money whatsoever, for the construction, erection or purchase of any municipal light plant, or any equipment or machinery therefor, in any way whatsoever in connection with or incident to such plant, its machinery or equipment, except upon any contract therefor heretofore duly entered into by said defendant city of *Milwaukee.*

"It is hereby further ordered that said defendant, city of *Milwaukee,* and said defendants, . . . be and are hereby, until the trial and determination of this action by said court, strictly enjoined and restrained from issuing, selling or disposing of the one hundred thousand dollars of municipal electric light bonds described in the complaint in this action, or any part or portion thereof, and from attesting, signing, countersigning or attaching the corporate seal of said city of *Milwaukee* to said bonds, or any of them. . . ."

The appeal is from the foregoing order.

Daniel W. Hoan, city attorney, and *Garfield S. Canright,* assistant city attorney, for the appellants.

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *W. C. Quarles.*

KERWIN, J. The order appealed from was granted upon the complaint, answer, affidavits, and certain proceedings of the common council of the defendant city. The material facts are substantially undisputed. It was established upon the hearing of the motion for injunction that the action was brought by the plaintiff on behalf of himself and all other taxpayers similarly situated; that the defendant city submitted a proposition to the voters whether $500,000 of municipal electric light bonds should be issued, which was car-

ried, and between January 1, 1902, and January 1, 1908, the city did issue $150,000 bonds and sold the same and received therefor $150,000 and purchased a piece of real estate in the city of *Milwaukee* for a site for said municipal electric light plant and paid $60,000 therefor; that the bonds were thereafter declared void by this court, and in May, 1911, the legislature of this state passed an act known as ch. 75, Laws of 1911, entitled "An act to create section 927—19*a*, to legalize bonds issued and sold by any city for the construction or purchase or erection and maintenance of an electric lighting plant, and to legalize the expenditure of the proceeds of such bonds;" that between July and August, 1911, the defendant city took proceedings for the installing of machinery in connection with a refuse incinerator in operation in defendant city and expended some $60,000 of the electric light bonds fund for such purpose, which said plant was to be an auxiliary plant and a unit of the city's main electric plant, the purpose of such auxiliary plant being to use the waste steam at the incinerator plant; that the defendant city has not obtained from the Wisconsin railroad commission, under ch. 499 of the Laws of 1907, any certificate of convenience and necessity; that there are several public utilities operating in the defendant city, and, among others, the Milwaukee Electric Railway & Light Company, which last named company had had a contract with the defendant city for the purchase of electric light in connection with municipal needs of defendant city, and that said the Milwaukee Electric Railway & Light Company owns an indeterminate permit under the laws of this state; that between September, 1910, and March, 1912, the defendant city issued $100,000 of municipal electric light bonds and was about to sell the same before this action was commenced and use the proceeds for the construction of a plant for furnishing electric light for lighting the streets, public grounds, and public buildings of the defendant city and for furnishing power for municipal pur-

poses in said defendant city; that prior to the 11th day of July, 1907, the defendant city spent, in addition to the $60,000 for a site in connection with the construction of the electric light plant in question, large sums of money, and prior to the passage of ch. 596, Laws of 1911, spent other large sums of money, aggregating upwards of $12,000.

There are some general allegations in the complaint denying the regularity of the proceedings of the common council of the defendant city, and also the validity of the last issue of bonds, and some charges respecting the unlawful diversion of funds. These allegations are positively denied in the answer. But the facts which go to the merits of the controversy here are undisputed, or substantially so.

On the part of the appellants it is insisted that the present action cannot be maintained by the plaintiff as a taxpayer; that the acts of the city which have been enjoined are lawful, and that as to the auxiliary plant the action cannot be maintained because of laches. The respondent seeks to sustain the order below on the following grounds: First, that the 1912 issue of bonds was illegal; second, that the construction of the auxiliary plant by diverting the proceeds of the 1906 issue of bonds for that purpose was unauthorized; third, that the city has no right to use the streets for stringing or laying its electric wires and cables; and fourth, that the defendant city cannot construct an electric light and power plant until it has obtained a certificate of convenience and necessity from the railroad commission. The last ground seems to be mainly relied upon for affirmance.

It is contended by counsel for appellants that the plaintiff as a taxpayer of the defendant city cannot maintain this action. But we think the question is not new in this state, and must be regarded settled against the contention of appellants. *Neacy v. Milwaukee,* 142 Wis. 590, 126 N. W. 8; *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Rice*

v. Milwaukee, 100 Wis. 516, 76 N. W. 341; *Oconto City W. S. Co. v. Oconto,* 105 Wis. 76, 80 N. W. 1113; *Weik v. Wausau,* 143 Wis. 645, 128 N. W. 429; *Herman v. Oconto,* 110 Wis. 660, 86 N. W. 681.

The 1906 issue of bonds was legalized by ch. 75, Laws of 1911, so there is no question made upon these bonds, and the auxiliary plant was constructed out of that issue, and the validity of the 1912 issue in no way affects the right of the city to construct the auxiliary plant. The attempt of the respondent to show that the 1912 issue is invalid is feeble. The allegations are general and there is no particular specification of grounds of invalidity. Besides, such allegations are on information and belief, and are positively denied in the answer. The facts showing invalidity presumably are such as to be capable of specification and positive allegation, and the rule of pleading pertaining thereto ought to be observed. *Steinberg v. Saltzman,* 130 Wis. 419, 110 N. W. 198. We have carefully examined the record and find no ground for holding that the 1912 bonds are illegal.

The alleged diversion of the so-called 1906 bonds is claimed to be illegal. These bonds are denominated "Municipal electric light bonds." One hundred and fifty thousand dollars of these bonds were issued in pursuance of a vote of the electors upon the following proposition, namely, "Shall $500,000 municipal electric light bonds be issued to erect and maintain a municipal electric light plant?" Forty thousand dollars of this issue was by resolution of the common council appropriated for installing certain machinery at the refuse incinerator plant for the purpose of utilizing surplus steam which otherwise would be wasted. A careful examination of the record does not show that there was any substantial diversion of the funds, even if it be admitted that a municipal electric light plant does not include a power plant, incidental or otherwise. The plant to which the said $40,000 claimed to be diverted was applied is known as the auxiliary plant,

and is, under the proceedings of the common council, a unit of the electric light plant and to be used, in part at least, for the generation and distribution and use for the city of electric light. And in this behalf it may be observed that the answer alleges that it is the intention to use the power generated at the auxiliary plant for lighting streets, public buildings and grounds, and to use for power purposes only so much thereof as shall not be necessary for lighting, and "to charge the sewerage fund of said city with the value of the power furnished for the operation of flushing station, and to credit the lighting fund with said amount." It seems clear from the record that the purpose of the city is to use the proceeds of the 1906 bonds primarily for lighting purposes, and therefore there is no diversion of the funds. Clearly, the use of electrical current at the flushing station or auxiliary plant for power purposes when not necessary for lighting purposes cannot avail the respondent in this action. *State v. Eau Claire*, 40 Wis. 533; *Bell v. Platteville*, 71 Wis. 139, 36 N. W. 831. The use for power at the auxiliary plant, upon the record, would be incidental when not needed for lighting, and to economize otherwise wasted electrical energy.

But the real contention of respondent's counsel is, not that the fund cannot be used for power purposes, but that it cannot be used for lighting purposes.

This brings us to the real contention of respondent on this appeal, namely: first, that the city has no right to use the streets for distributing the electrical energy generated by the plant; and second, that it cannot operate a plant without a certificate of convenience and necessity from the railroad commission.

Express statutory authority is conferred upon cities to light streets, public buildings and grounds. Sec. 926—11, Stats. (1898). Having such power, it necessarily follows that it may use the streets for the accomplishment of such purpose. *Ellinwood v. Reedsburg*, 91 Wis. 131, 64 N. W. 885. Whether

the statutory authority above referred to is in any way qualified by the public utility act (Laws of 1907, ch. 499) we need not consider in this case, since we shall show later that the public utility act does not apply to the instant case. The argument of respondent to the effect that the streets cannot be used by defendant city without obtaining a certificate of convenience and necessity from the Wisconsin railroad commission, if we understand it, seems to be based upon assumed contract relations between owners of rights under the public utility law and the state. Counsel say in their brief: "But the point of cleavage clearly exists where the municipality undertakes to light its streets, erect poles, and string wires thereon in derogation of the contract between the state and the holder of an indeterminate permit within the municipality." The appellants contend that a certificate of convenience and necessity is not necessary, for three reasons: first, that it is not necessary where a private corporation or municipality intends to construct a plant and generate electricity for the purpose of supplying its corporate needs; second, that the city having commenced construction of its plant before there was in existence in said city a plant operated under an indeterminate permit, by express provision of the statute the certificate is unnecessary; and third, that since the passage of the public utility act the legislature has expressly authorized the building of the plant without a certificate of convenience and necessity. The last two propositions, we think, control this case, and the first need not be treated. The public utility act was passed in 1907. In 1906 the defendant city issued and sold bonds for the erection and maintenance of an electric lighting plant, bought a site for that purpose, and subsequently to the issue of the 1906 bonds and in 1910 the common council of the defendant city authorized the construction of the plant in question and caused to be issued a second series of bonds by authority of a vote duly taken for that purpose. Therefore, the public utility act not having passed until July, 1907, the city, up to that time at

least, had a right to construct a plant without first obtaining a certificate of convenience and necessity, and it appears that the city had in fact expended upwards of $60,000 on such plant and incurred other indebtedness in that behalf. Clearly, under the law there was no duty resting upon the defendant city to obtain a certificate of convenience and necessity when there was no public utility, or when an existing one was operating without an indeterminate permit. Sec. 1797*m*—74, subsec. 4, provides: "Nothing in this section shall be construed so as to prevent the granting of an indeterminate permit or the construction of a municipal plant where the existing public utility is operating without an indeterminate permit, as provided in this act." Moreover, we think it clear that under ch. 75, Laws of 1911 (sec. 927—19*a*, Stats.), no certificate of convenience and necessity was necessary. This act gives express authority to construct the plant in question without a certificate of convenience and necessity.

Ch. 75, Laws of 1911, provides:

"Whenever any bonds heretofore or hereafter issued and sold by any city, whether incorporated under general law or special act, for the construction or purchase or the erection and maintenance of an electric lighting plant, and the proceeds of which shall have been expended in whole or in part by such city in or about the construction or purchase of such plant, or of a site therefor, shall be invalid for any reason, and such city shall, by further proceedings subsequent to such issue, sale, and expenditure, have determined in the manner provided by law to issue bonds for the construction or purchase of an electric lighting plant, or for the construction of a plant for the production, transmission, delivery, and furnishing of electric light for lighting streets, public grounds, and public buildings in the said city, and for the production, transmission, delivery and furnishing power for municipal purposes, said invalid bonds theretofore issued and sold shall, if ratified by a majority vote of the members elect of the common council of such city, be legal and binding; and such city is authorized and empowered, after such ratification, to use any property acquired with the proceeds of such bonds and

any unexpended portion of such proceeds in and about the construction or purchase of an electric lighting plant for which such city shall have legally determined to issue bonds as aforesaid; provided that such invalid bonds, upon being so ratified, shall not be considered an addition to the bonds legally authorized, but as a part thereof."

The record shows that the city comes directly within the terms of ch. 75, Laws of 1911 (sec. 927—19*a*, Stats.), and since this law gives the right to complete the plant without any mention of certificate of convenience and necessity, it must be held that the legislature intended that none should be required.

Some reliance seems to be placed upon ch. 596, Laws of 1911, by the respondent. The constitutionality of this act is attacked by counsel for appellants. But in the view we take of the case, as heretofore indicated, we do not regard the amendment (ch. 596, Laws of 1911) applicable here, and shall not consider its constitutionality.

It follows from what has been said that the order appealed from must be reversed.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

SCHWAB, Appellant, vs. ESBENSHADE, Respondent.

November 19, 1912—January 7, 1913.

Fraud: Sale of corporate stock: False representations: Rescission: Waiver of right: Evidence: Questions for jury.

1. A false representation, made by the vendor to induce the purchase of corporate stock, that he had arranged with the other stockholders that upon the sale being made the purchaser would be elected treasurer and business manager of the corporation and would receive a certain weekly salary, was a material representation and, if the purchaser relied thereon in making the purchase, constituted ground for a rescission of the contract.

2. Upon the evidence in this case, the questions whether such representation was made and whether the purchaser relied thereon were for the jury.
3. Negotiations had by the purchaser with other stockholders upon the same subject, prior to the purchase, do not indisputably show that he relied wholly upon their statements and not upon the representations of the vendor.
4. The fact that the purchaser of the stock, after being elected to a different position and at a less salary than that promised him, with full knowledge of the facts remained with the corporation for two weeks performing the duties of the position and accepting the compensation voted him, did not, as a matter of law, constitute a ratification of the contract and a waiver of his right to rescind, where it appeared that he at once protested to the vendor, refused to accept the result, offered to return the stock, demanded back his money, and told the vendor he would remain and do the work assigned only for the time being and because he was without other employment; but upon the whole evidence the question of waiver was one for the jury.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

The plaintiff seeks to have a contract for the purchase and sale of stock in the Westfahl File Company declared rescinded, and to recover the money paid by him to the defendant as the consideration for the sale.

Some time prior to October, 1910, the plaintiff, then twenty-two years of age and a teller in the Merchants and Manufacturers Bank in the city of Milwaukee, stated to the defendant, a patron of the bank, that he desired to get into some business where he might use his experience and ability and work for himself. The defendant suggested that the plaintiff buy his interest in the Westfahl File Company, of which the defendant was then a member of the board of directors, the treasurer, and the business manager. His interest consisted of one half of the stock, 220 shares, of the par value of $22,000. The defendant had been engaged in the business of manufacturing files for some twenty years, was a man of years, and desired to retire from active business.

The defendant at first asked $30,000 for his interest, but

after some negotiations between the parties $25,000 was agreed upon as the price to be paid for his interest; $1,500 to be paid in cash, the balance in the form of several notes. The plaintiff testified that the defendant assured him at first that he could arrange, and thereafter that he had arranged, with the other stockholders that the plaintiff should be elected to the positions he himself held with the company and that the plaintiff should receive the same salary the defendant was receiving, $40 per week. A contract for the sale and purchase of the stock was duly signed. It contains nothing referring to the positions and the salary the plaintiff was to receive from the company. During the negotiations the plaintiff talked with the other stockholders and officers of the company regarding its affairs and made some examination of the books and the stock and manufacturing plant. He testified that he relied absolutely upon the statements of the defendant as to the value of the stock and the assurances given him by the defendant that the defendant had fixed it with the stockholders so that the plaintiff would hold the positions defendant held and would receive the salary of $40 per week.

At a special meeting of the stockholders of the company held on October 5, 1910, the plaintiff was duly elected a director of the company. At the meeting of the board of directors held the same day he was elected sales manager and his salary was fixed at $35 per week, and a resolution was adopted that all checks drawn by the treasurer should be countersigned by the plaintiff as director. The plaintiff was dissatisfied with the action taken and testifies that he complained to the defendant and that he was then assured by the defendant that matters would be arranged satisfactorily. He offered to return the stock and demanded the return of the $1,500 and of the notes he had given the defendant as the consideration for the stock. The plaintiff worked for the company for two weeks. He states that he so worked because he had given up his position with the bank and had no other position open

to him. Subsequently, the plaintiff having failed to pay some interest due on the notes, the defendant notified him that, deeming it necessary to secure the payment of the notes, the defendant had had transferred to himself the shares of stock which the plaintiff had assigned to him as security for the payment of the notes.

The defendant denied that he had promised that the plaintiff should be elected treasurer and have a salary of $40 per week. There was evidence on the trial tending to show that the contract price of the stock was in excess of its fair market value.

Exception was taken to the charge of the court to the jury on the ground that the court erred in not submitting to the jury the issues of fraud alleged and sustained by the evidence. Judgment was duly entered in favor of the defendant for costs on the verdict of the jury in favor of the defendant. This is an appeal from the judgment.

For the appellant there was a brief by *McElroy & Ferguson,* and oral argument by *W. J. McElroy.*

Samuel M. Field, for the respondent.

SIEBECKER, J. The trial court informed the jury that the plaintiff sought to recover the $1,500 he had paid as part of the purchase price of the stock, upon a rescission of the contract of sale on the ground of fraud; that the plaintiff alleged as fraudulent the defendant's representations as to the value of the stock; that he also alleged that the defendant, with intent to deceive and induce the plaintiff to purchase the stock, falsely represented that he (the defendant) had arranged with the other stockholders and the directors of the company that if the plaintiff would purchase defendant's stock plaintiff would be elected a director, the treasurer, and the business manager of the corporation and would be paid a salary of $40 per week; that the plaintiff claimed that he relied and acted on this arrangement in en-

tering into the written contract with the defendant for the purchase and sale of the defendant's stock for the sum of $25,000; that the plaintiff now asserted that he had canceled the contract on account of such fraud; and that he demanded the return of the money he had paid the defendant as part of the purchase price.

There is no serious controversy on this appeal but that the court by its instructions directed the jury to limit its inquiry to the issue of the alleged fraud pertaining to false representations as to the value of the stock, and thus excluded from its consideration and determination the question of the alleged fraud of the defendant in falsely representing to the plaintiff that he had arranged with the other stockholders and directors that if plaintiff purchased defendant's stock he would be made a director, the treasurer, and the business manager of the corporation and receive a salary of $40 per week. If these last alleged false representations were made by the defendant and if plaintiff relied and acted thereon as he alleges, they manifestly constitute a material representation, and the question of whether or not they were fraudulently made was an essential and material issue; and failure to submit it to the jury was obviously prejudicial error, if the evidence in the case on this issue of fact was sufficient to carry it to the jury.

The contention of the respondent is that the omission of the court to submit this issue to the jury constitutes no error upon the trial, for the reason that the evidence was insufficient to sustain a verdict finding that the defendant made the alleged false representations to induce the plaintiff to make the contract for the purchase of the stock and that plaintiff relied thereon in making the purchase. The plaintiff testified that he met the defendant as a customer of the bank and informed him of his desire to leave his employment in the bank and to engage in some business for himself where he could make use of his experience and business

knowledge to promote his personal interests; that the defendant suggested that the plaintiff purchase defendant's interest in the corporate business and thereby be put in a position to take the place in the corporation which the defendant held; that this led to negotiations between them with this end in view; that the defendant communicated to the plaintiff many facts regarding the business affairs of the corporation and stated to him the condition and value of the property, upon which plaintiff relied in buying defendant's stock; that the defendant represented if plaintiff would purchase defendant's stock in the concern defendant would make arrangements with the other stockholders to secure for the plaintiff the same positions defendant held as a member of the corporation; that plaintiff assented to purchase defendant's stock upon these conditions; and that the defendant at their next meeting informed the plaintiff that he had made this arrangement and it was fixed: "I would come in and take his position if I would buy him out. Right then and there I gave him a check for $1,000." Other statements of a like effect were given in evidence by the plaintiff, with some variation of phraseology but of no practical difference. The defendant denied that he made these representations. Plaintiff's evidence on this subject, if the jury found it credible, was in no way consistent with the defendant's innocence of this fraud. Nor is it so uncertain and ambiguous in its effect that it can be held as matter of law not to warrant the jury in finding it of sufficient probative force to repel the presumption of innocence and fair dealing between the parties. We are persuaded that the evidence presented a conflict on this point which should be resolved by a jury.

It is contended by the respondent that the evidence shows that the plaintiff did not rely on these representations in making the purchase of the defendant's stock. An examination of the record shows that there is evidence in the case tending to show that the plaintiff relied thereon. The in-

ferences to be drawn from the facts and circumstances on this subject are not so clear and compelling that it can be said as matter of law that plaintiff did not rely on the representations which he alleges induced him to make the purchase. The negotiations he had with the other stockholders do not indisputably show that the plaintiff in fact relied on their representations in the matter or that he would have made the contract regardless of the alleged promises of the defendant to obtain the positions and salary for him if he purchased the stock.

It is also contended that the plaintiff, by attending the stockholders' and directors' meetings and by accepting the employment offered him at a less compensation, after being denied an election to all the positions defendant had theretofore held and the salary of $40 per week, waived all the defaults of the defendant in the transaction in respect to the contract and ratified the contract of purchase and sale of the stock by retaining it, and that he thereby precluded himself from rescinding the sale. True, it appears that the plaintiff, with full knowledge of these facts, remained with the corporation for two weeks and accepted the compensation voted him. It also appears that the plaintiff immediately protested to the defendant that he had not fulfilled his promises, that he expressed dissent from what had been done at the directors' meeting and informed the defendant that he would not accept the result, that he offered defendant the stock and demanded the return of the purchase money paid thereon; that he told the defendant he would remain and perform the work assigned him only for the time being and because he was without other employment; and that he at all times insisted to the defendant that he would not accept the situation in fulfilment of the arrangement between them. It seems that the defendant held the stock as security for the unpaid purchase money, and shortly after plaintiff left the employment of the corporation the stock was retransferred on

the books of the corporation to the defendant and that he has not repaid any of the $1,500 received as part payment from the plaintiff. The evidence presents an issue of fact for the jury to decide, whether the plaintiff repudiated the offers made to him as a stockholder in place of what defendant had agreed to secure for him, or whether he acquiesced in the situation as it was and thereby ratified the transaction of the stock purchase from the defendant. From these considerations it must follow that the court committed prejudicial error in not submitting these questions to the jury, and a new trial must be had.

By the Court.—The judgment appealed from is reversed, and the cause remanded for a new trial.

STATE EX REL. CITY OF MILWAUKEE, Respondent, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

November 21, 1912—January 7, 1913.

Street railways: Franchises: Duty of city council in granting: Construction: Requirements: Repairing portion of street: Repaving: Consolidation of companies: New franchise preserving requirements of prior ones: Practical construction: Estoppel.

1. In granting a franchise for a street railway a city council acts as a trustee for the public, and it is its imperative duty to guard the public interests in every way reasonably within its power.
2. If the franchise granted contains stipulations or provisos evidently intended to protect the public interests, it will be assumed that they were inserted to secure and conserve for the public advantages which are valuable and substantial, rather than trifling and inconsiderable; and if the language used be equally capable of two constructions, that which safeguards the public interest substantially must be given preference to that which secures only an insignificant or unsubstantial advantage.
3. In a franchise running for thirty-seven years, a provision that the railway company "shall keep and maintain in good and

thorough repair during the continuance of said term" that portion of the street lying between the outside rails of the tracks, and one foot on either side thereof towards the curb line, "of the same material as that of which the said street shall be composed at any time when such repairs shall be necessary," means that the company is to keep a certain part of the street in repair, and that when a given pavement becomes defective and unsafe the company must renew that portion of the pavement within its zone, using the same material which the city uses in the remaining portion of the street. *Blount v. Janesville*, 31 Wis. 648, distinguished.

4. Upon consolidation of street railway companies operating in a city under separate franchises, a new franchise ordinance was passed by the council, extending to a uniform date the previous franchises, granting the use of additional streets, and containing certain uniform provisions as to repair of streets and pavements, but declaring that all rights reserved or secured to the city by the prior ordinances, relating to the laying of tracks "and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to the city the same as though this ordinance had not been passed," and further that the provisions of the prior ordinances "so far as any or either of them relate to . . . the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same . . . shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed." *Held*, that the provisions of the prior ordinance above stated (in No. 3) continued in force, unimpaired by the new ordinance.

5. Where there is no ambiguity in an ordinance or statute the doctrine of practical construction has no application.

6. The fact that after the passage of the new ordinance the city required the company to make repairs under its provisions could not estop the city from enforcing the broader and more comprehensive requirements, if any, contained in the prior ordinances, which still remained in force in addition to the requirements of the new ordinance.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This is an action of *mandamus* brought on relation of the city of *Milwaukee* to compel the defendant company to pave with asphalt pavement on a concrete foundation that portion

of Walnut street in said city lying between the outside rails of its double track and one foot on either side thereof. From a judgment awarding a peremptory writ in accordance with the petition the defendant appeals. The material facts are simple and practically undisputed. June 6, 1887, the city by ordinance granted to the Milwaukee City Railway Company, the defendant's assignor, the right to lay and operate a double-track street railway upon Walnut street, which ordinance contained the following provision:

"Section 4. The rights and privileges accorded by this ordinance shall remain and be in force up to the first day of July, 1924, unless sooner terminated by law, and said railway company shall keep and maintain in good and thorough repair during the continuance of said term, at its own costs and charge, all the portion of said Walnut street lying between the outside rails of the tracks hereby authorized to be laid, and one foot therefrom, towards the curb line, of the same material as that of which the said street shall be composed at any time when such repairs shall be necessary."

The tracks were laid and the railroad operated thereon pursuant to this ordinance. At some time after the passage of the ordinance the street was paved from curb to curb with a wooden block pavement. Prior to January, 1900, this franchise, with others of a similar nature on other Milwaukee streets, had been purchased by the defendant with the purpose of combining all the street-car lines in the city into one system, and the city council of *Milwaukee* on January 2, 1900, passed an ordinance entitled:

"AN ORDINANCE authorizing the *Milwaukee Electric Railway & Light Company* to construct, maintain and operate street railways in the city of *Milwaukee* over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and right of ways heretofore or hereby granted to said company, or to its predecessors and assigns and providing for the rates of fare to be charged and for certain transfer privileges."

By sec. 1 of this ordinance permission was given to the defendant to lay tracks and operate street cars thereon "on those streets in the city of *Milwaukee* and in the manner and upon the conditions herein set forth."

Secs. 2 and 3 are as follows:

"Sec. 2. The poles of said railway company are to be placed or replaced according to a plan submitted to and approved by the board of public works; provided, however, that said board shall have the right to change the location of poles as indicated on the plan so submitted, and all poles to be placed or replaced according to the said approved plan and under the supervision and direction of the said board of public works. The track of the said railway shall be of the gauge of not more nor less than four feet eight and one-half inches, and shall not be elevated above nor depressed below the established grade of the street. It shall be laid with modern improved rails, as approved by the board of public works, and in such manner that carriages and other vehicles can easily and freely cross said streets at any and all points and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. Said railway company shall operate thereon street railway cars and carriages by means of power produced by electricity conducted upon wires suspended over and above its tracks, or such other power as may be agreed upon between said city and the said railway company, its successors and assigns.

"Sec. 3. All rights reserved or secured to said city by and under all ordinances now in force or the laws of Wisconsin relating to regulating the speed and headway of cars, the time that cars shall be operated each day, the laying of tracks, stringing of wires, and the use and operation of all

cars and tracks and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to said city the same as though this ordinance had not been passed, and the same shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided."

By sec. 4 permission is granted to occupy and use for street railway purposes, in addition to the streets already occupied, a considerable number of streets and parts of streets, with certain provisos and stipulations as to the use of viaducts and bridges and as to the extension of lines within the city limits, which are not material here.

By sec. 5 all the rights and privileges conferred by the ordinance are declared to extend to December 31, 1934, and all the rights and privileges theretofore conferred upon the company or its assignors are extended to the same date.

By sec. 6 rates of fare and transfer privileges are regulated; by sec. 7 all rights previously conferred by the city on the defendant and its assignors are confirmed; and by sec. 8 the defendant agrees to furnish electric power to swing all the swing bridges in the city crossed by the company.

Secs. 9 and 10 are as follows:

"Sec. 9. Whenever the said city shall determine to pave or repave any street upon which street-car tracks are or shall be situate, the board of public works shall give notice thereof to said railway company, and thereupon said railway company shall immediately make all such repairs, connections, conduits and improvements as it shall then deem necessary for the use and operation of its tracks and railway; after any such street shall be paved by said city the pavements thereon and the pavements upon any and all streets heretofore paved by said city shall not be opened or disturbed by said railway company for any purpose whatsoever, except by permission in writing therefor signed by the mayor and the members of the said board of public works. And whenever any such permit shall be given the city engineer shall promptly give plans and specifications for opening and closing the pavement, and said rail-

way company shall do such work according to such plans and specifications and under the supervision of said board of public works and city engineer and to their satisfaction, and said board shall have power to employ necessary and competent inspector or inspectors to actively superintend the work, and his compensation shall be paid by said railway company; and if said railway company shall fail or neglect or refuse to properly replace or repair any pavement so opened the city shall have the right to replace or repair the same by and under the direction of said board of public works, and said railway company shall pay the actual cost and expense thereof.

"Sec. 10. The provisions of all ordinances now existing, so far as the same or any or either of them, relate to the use and operation of said railways, such as the removal of snow and ice therefrom, the joint use of tracks by other companies or persons, the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same, the gauge, grade and elevation of tracks and the manner of constructing the same shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed."

The remaining sections are not material to the questions arising in this case.

Some time prior to 1911 the wooden block pavement on Walnut street, including that part within the rails of the street railway tracks, became worn out, decayed, and rotten, so that repair with wooden blocks was practically impossible, and in September, October, November, and December of that year the city laid an asphalt pavement on a concrete foundation in the street from the curb on each side to a line one foot outside of the outermost street railway track. The defendant refused to lay such a pavement between its rails or on the one-foot strip outside of its rails, claiming that it was not compelled to do so by either ordinance, and this action was commenced February 3, 1912, to compel it do so. From judgment awarding the peremptory writ the defendant appeals.

For the appellant there were briefs by *Miller, Mack & Fairchild,* and oral argument by *E. S. Mack* and *J. G. Hardgrove.*

For the respondent there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

WINSLOW, C. J. There are but three questions in this case: First. Does sec. 4 of the ordinance of 1887 require the company to repave its portion of the roadway under the circumstances here present? Second. If so, does the ordinance of 1900 repeal that section? And third. Has the city lost any rights by practical construction or estoppel?

1. The argument for the appellant on the first proposition is that the ordinance carefully uses the word "repair" and does not use the word "repave," that the two words have very different meanings, and that a promise to repair cannot logically be held to impose a duty to repave. The argument is not without its weight and it has received our very careful consideration.

The question is a new one in this court. We have no precedent either to guide or constrain our minds. We do not regard the case of *Blount v. Janesville,* 31 Wis. 648, which is somewhat relied on by the appellant, as having any substantial application. In that case the city charter of Janesville provided, in substance, that the expense of paving a street should be chargeable to the adjoining lots and the expense of keeping in repair a street which had been already paved should be paid out of the ward fund. It became necessary to decide in that case whether the regrading and repaving of the entire street with different material from that with which it was first paved should be called "paving" or "repairing" within the meaning of those words as used in the charter, and it was held that it must be considered as paving and not repairing.

In that case the court was faced with an alternative. The act in question must be classed either as "paving" or "repairing"—it could not be both. In the present case we are simply to determine whether a promise to keep in repair for a long period of years a portion of a street must not be construed reasonably as a promise to repave that portion when it has fallen into disrepair and the remaining portion of the street has been repaved with a different form of pavement.

The two questions are palpably very different, and we do not consider the *Blount Case* as controlling or even helpful in the consideration of the present case.

In approaching the question it is important that certain fundamental propositions should be kept in mind. In granting street-car franchises in a city the city council is not acting as a proprietor or as a private citizen acts when selling his property to another citizen, but is acting merely as a trustee for the public. The council is charged with the very responsible duty of acting for the great mass of the people, in whom in fact is vested the easement in the public streets. It is quite impracticable for the people themselves to act as a body when such questions are under consideration. The great majority of the people are so deeply engaged in their own individual concerns, and the municipal problems of a great city are so numerous and intricate, that it is impossible to adapt the methods of the New England town meeting to the government of the modern great city. The people must act through their chosen representatives. Those who are seeking to obtain franchises from the council know that they are dealing with trustees, and they know also that when they obtain the right to use the best portion of the street for a long period of years in transporting passengers for hire they obtain a most valuable privilege. If they give good service they may justly claim to be public benefactors in one sense, but the fact remains that they are doing business for private

gain upon the property of the public, and that it is only the presence of the public that enables them to do that business successfully.

So when the trustees of the public grant such valuable privileges to a corporation organized primarily for private gain, it is their imperative duty to guard the public interests in every way which may be reasonably within their power. The endeavor should be to make certain that there be secured to the public some fairly adequate return for the privileges granted. When, therefore, in such a case the franchise contains stipulations or provisos evidently intended to protect the public interests, it must and will be assumed that the council endeavored to perform its full duty, and that the stipulations and provisos were inserted for the purpose of securing and conserving for the public advantages which are valuable and substantial, rather than trifling and inconsiderable.

All the intendments must logically be favorable, rather than adverse, to the public. Plain words and plain sentences must and will be given their plain meaning; but if there be language equally capable of two constructions, that construction which safeguards the public interest *substantially* must be given preference to that construction which secures only an insignificant or unsubstantial advantage to the public.

With these principles in mind we may proceed to the consideration of the meaning of the provisions of sec. 4 of the ordinance of 1887.

It is to be noted in the first instance that the franchise runs for thirty-seven years. It must in reason have been contemplated that during that period of time there would be more than one repaving of the street necessary. Those who remember the fleeting nature of the wooden pavements which were in vogue in 1887 cannot doubt that such must have been the expectation.

Now while it is significant, as argued by the appellant, that

the ordinance nowhere uses the word "repave," it is also significant that it does not simply require the company to "repair the pavement," but instead thereof requires it to "keep and maintain in good and thorough repair during the continuance of said term" *a certain portion of the street.* The difference in meaning which may well exist between keeping a certain part of the pavement of a street in repair, and keeping a certain part of the street itself in repair, is very obvious. It can hardly be claimed, we think, that these words in the ordinance were used carelessly or unadvisedly. Again, from the last clause of the section the argument is persuasive that something more than mere incidental repair of a casual defect in the pavement was meant. By this clause it appears affirmatively that it was contemplated that there would probably be one or more entirely new pavements laid, and hence it was provided that the company in making repairs should use the same material as that of which the street should be composed *at the time.*

In effect the promise of the company is to keep and maintain its portion of the street in good repair and of the same material as that used by the city on the street.

In our judgment the whole clause, when reasonably and logically construed, means that the company is to *keep the street* in repair, and that when a given pavement becomes defective and unsafe the company must renew that portion of the pavement within its zone, using the same material which the city uses in the remaining portion of the street.

So far we have discussed the question as an original one and have reached a conclusion upon consideration of the language of the ordinance alone. This course has seemed best, not because of the absence of cases in which somewhat similar questions have been presented to the courts, but rather because differences in the wording of the clauses governing the rights in the various cases render it quite impossible to say that any given case is exactly parallel to the one

before us. There have been many cases, however, where the general question whether an obligation to repair meant to repave has been presented to the courts, and the decisions are in much conflict. It is said in 3 Dillon, Mun. Corp. (5th ed.) § 1276, that

"when the requirement of the statute, or of the condition of the franchise, is merely that the company shall repair the street, there is no obligation upon the company to do more than make such repairs as are required to keep the street in a safe condition for public travel, and the company cannot be compelled to pave the street, or to bear the cost thereof. But when the company is required not merely to repair, but to keep the portion of the street occupied by its tracks in as good repair and condition as the remainder thereof, the courts have, in some instances at least, construed this obligation as requiring the company to pave the street whenever paving is necessary to bring the portion occupied by its track into as good condition as the rest of the street."

To the first of these propositions Mr. Dillon cites *Western P. & S. Co. v. Citizens' St. R. Co.* 128 Ind. 525, 26 N. E. 188, 28 N. E. 88; *Baltimore v. Scharf,* 54 Md. 499; *State ex rel. Kansas City v. Corrigan C. St. R. Co.* 85 Mo. 263; *Kansas City v. Corrigan,* 86 Mo. 67; *Hurley v. Trenton,* 66 N. J. Law, 538, 49 Atl. 518; *Norristown v. N. P. R. Co.* 148 Pa. St. 87, 23 Atl. 1060; *Philadelphia v. H., M. & F. P. R. Co.* 177 Pa. St. 371, 35 Atl. 718; and *Williamsport v. W. P. R. Co.* 206 Pa. St. 65, 55 Atl. 836.

To the second proposition he cites *State ex rel. Jacksonville v. Jacksonville St. R. Co.* 29 Fla. 590, 10 South. 590; *Columbus St. R. & L. Co. v. Columbus,* 43 Ind. App. 265, 86 N. E. 83; and *Mayor, etc. v. H. B., M. & F. R. Co.* 186 N. Y. 304, 78 N. E. 1072.

Mr. McQuillin, in his work on Municipal Ordinances, published in 1904, at sec. 577 says: "The obligation to repair has been held to require repaving; but the weight of authority appears to support the contrary rule."

Upon the same subject it is said in Nellis on Street Railways, at sec. 155: "An obligation to keep the street in repair does not compel the company to grade or pave the street."

Neither the statement of Mr. Nellis nor that of Mr. McQuillin can be considered as entirely accurate or complete. They have attempted to compress too much into a single sentence. The statement of Mr. Dillon is more nearly accurate, namely, that where the obligation is simply to repair, many cases hold that repaving is not included, but where the obligation is to maintain its portion of the street in as good repair as the remainder, the courts have frequently held that when the company's zone of pavement falls out of repair it must repave the same to correspond with the pavement of the balance of the street.

We think, however, that the true doctrine is more accurately expressed by Elliott on Roads and Streets (3d ed.) at secs. 987 and 988, as follows:

"Our conclusion is that where there is a clearly expressed requirement binding the company to repair, the duty is a continuing one, and the repairs must be so made as to correspond with the changed condition of the street wrought by the improvement made under the direction of the municipality. . . . To illustrate our meaning: If a street paved with wooden blocks is subsequently paved with stone, it would be the duty of the company, when it became necessary to repair after the improvement by paving with stone, to make repairs to correspond with the changed condition of the street. It would not, as we interpret the rule sustained by the weight of authority, be compelled to make the new pavement, but it would be its duty, in making repairs after the new pavement was laid, to make them to correspond to the new pavement. Any other rule would make the duty to repair practically valueless, and not only this, but it would tend to check the growth and development of towns and cities without just reason or excuse."

Such also is the conclusion reached by the cyclopedias. 27 Am. & Eng. Ency. of Law (2d ed.) 41, 42; 36 Cyc. 1408.

The case of *Mayor, etc. v. H. B., M. & F. R. Co.* 186 N.

Y. 304, 78 N. E. 1072, seems well considered and persuasive. In that case the railroad company was required by its charter to "keep the surface of the street inside its rails and for one foot outside thereof in good and proper order and repair." At the time the charter was granted and the road constructed there was no complete pavement, but only a sort of rough macadam road. Later the city determined to pave the entire street with granite blocks and served notice on the company requiring it to pave its zone with such blocks. It appeared that the railroad zone was not in good repair. The question was whether under these circumstances the company was bound to lay the new pavement at its own expense in its zone. In deciding this question in the affirmative the court said:

"The question of what shall constitute keeping the pavement in the tracks of a railroad company in good order and repair is to be determined somewhat at least with reference to existing and surrounding conditions, and in our judgment it would be altogether too narrow a view to hold that where a municipality had, for sufficient reason, decided to pave a street with asphalt or other new pavement, a railroad might discharge its obligations to keep its part of the street in good order and repair by merely patching up a dirt road or some species of pavement which had become antiquated and out of condition, and which was entirely different from that adopted in the remainder of the street."

This seems to us good law and good sense. The idea that, when the pavement of a street has become dilapidated and the city authorities have determined that a new and more enduring pavement should be put down, a street railway company which has agreed to maintain its portion of the street in repair can discharge that duty by patching up the old and perhaps out of date pavement year after year, seems little short of absurd. So construed, the promise "to keep and maintain" the railroad zone of the street "in good and thorough repair" becomes a collection of words mighty in sound but correspondingly insignificant in effective meaning. The result of such

a construction is that the street railway may lawfully stand in the way of the progress of the municipality by insisting on patching up an inferior kind of pavement within its zone, while the city has adopted a superior and relatively permanent pavement for the balance of the street.

We have not attempted to review the conflicting authorities on this subject which will be found cited in the text-books and cyclopedias before mentioned, because such a review would be of no value. As before stated in this opinion, there are no precedents in this court to constrain our action, and we are free to adopt and do adopt that construction of the clause in question which seems the more reasonable and just.

2. The next contention is that the provisions of sec. 4 of the ordinance of 1887 have been repealed by the ordinance of 1900, and that under the latter ordinance the company is not required to repave in any event.

We do not now express or intimate any opinion upon the question whether under the provisions of secs. 2 and 9 of the ordinance of 1900 the company is required to repave the railroad zone when the pavement has fallen out of repair.

Assuming that the section only requires repairing of existing pavements, we still do not think that the obligations imposed by sec. 4 of the ordinance of 1887 have been in any manner affected thereby.

The purpose of the ordinance of 1900 is quite plain. The defendant company had acquired by purchase the property and franchises of a number of independent companies which operated street cars in the city of *Milwaukee*. There were more than thirty separate ordinances granting railway rights, covering as many different routes, expiring at different dates, and in these ordinances the provisions as to the repair of streets by the company were expressed in very many different ways, while some ordinances contained no provisions on the subject. The defendant desired to create a complete railroad system covering the whole city out of the various fragmentary

systems, and it is evident that the city government deemed it for the public interest that such a system should exist, hence the ordinance of 1900, which granted added routes and contained uniform provisions as to the construction of roads, the repair of roadways, the extension of tracks, the duties of the company as to the widening and strengthening of the viaducts and bridges which they might use, the rates of fare and granting of transfers, and other cognate subjects. This ordinance further provided that all the previous franchises, whatever the original date of expiration, should be extended to December 31, 1934.

It is argued that the sections of this ordinance relating to the repair of streets and pavements were obviously intended to provide an uniform system covering all the lines and to take the place of the various repair provisions of the previous ordinances, and hence must be construed as impliedly repealing them. We have no doubt that the repair provisions of the ordinance of 1900 were intended to apply to all the lines then operated or to be operated in the future by the defendant. As to any new lines, as well as to any of the lines which were built under ordinances containing no provisions concerning the repair of streets, the provisions of the ordinance of 1900 would, of course, be the only provisions governing the subject; but would that be the result as to lines built under ordinances which, like the ordinance of 1887, contain a distinct and definite requirement not only that repairs be made when necessary, but that repaving be done when necessary?

The answer to this question must depend largely upon the other provisions of the ordinance of 1900. If it were silent as to the rights guaranteed to the city under the previous ordinances, the argument would be strong that its provisions amounted to a codification and rewriting of the law governing the whole subject and supplanted entirely the former provisions.

Turning to the ordinance itself, however, we find what

seem to be very clear statements of the intent of the council to preserve untouched all the rights secured to the city under the previous ordinances.

By sec. 3 of the ordinance of 1900 it is declared that "all rights reserved or secured to said city by and under all ordinances now in force . . . relating to . . . the laying of tracks, stringing of wires, and the use and operation of all cars and tracks *and everything connected with the exercise of the rights hereby or heretofore granted* to said railway company and its predecessors, *are hereby reserved* to said city the same as though this ordinance had not been passed."

It is true that this is a very general reservation of existing rights, and it is quite possible that if it stood alone it could hardly be construed as effective to preserve existing requirements concerning the repair of streets which were more comprehensive than those contained in the ordinance itself. It is supplemented, however, by the more specific reservation contained in sec. 10. By this section it is provided that

"The provisions of all ordinances now existing, so far as the same or any or either of them, relate to the use and operation of said railways, such as the removal of snow and ice therefrom, the joint use of tracks by other companies or persons, the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same, the gauge, grade and elevation of tracks and the manner of constructing the same shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed."

The provisions of sec. 4 of the ordinance of 1887 undeniably relate to the repairing and maintaining of streets. No narrow or technical construction of these saving provisions can be indulged in; the manifest intent of the council must be given effect. We can see no doubt that sec. 10 of the ordinance of 1900 in plain terms preserves the rights secured to the city by the prior ordinance, and hence that the requirements of sec. 4 of the ordinance of 1887 still exist unimpaired

by any of the provisions of the ordinance of 1900, even if it be assumed that the latter provisions are less comprehensive than the former.

3. Upon the trial the defendant offered to prove that since the passage of the ordinance of 1900 the city had uniformly construed the same as uniformly applicable to all streets on which cars were operated, and demanded that repairs be made according to its terms on streets which under the original ordinances were not required to be repaired by the company; also that the defendant company had acceded to these demands and made the repairs asked by the city.

This testimony was excluded, and it is claimed that this ruling is erroneous for the reason that such testimony would have shown a practical construction by the city authorities of the doubtful or ambiguous provisions of the ordinance of 1900, and would also have shown that the city has estopped itself from claiming a different construction for that ordinance. We do not regard either contention as sound.

As to the first contention, we may say that the ordinance of 1900 does not seem to us ambiguous in this respect. It definitely provides that all rights secured to the city by previous ordinances with regard to the repairing, replacing, and maintaining of streets are preserved in full force. Where there is no ambiguity there is no room for the doctrine of practical construction.

Nor do we see how estoppel results from the fact that the city has required the company to make repairs under the provisions of the ordinance of 1900 since the passage thereof. As we have before stated, the provisions of that ordinance undoubtedly apply to all streets, but if, as to any streets, there be more comprehensive and broader requirements in the former ordinances, they still remain in force, in addition to the requirements of the ordinance of 1900.

By the Court.—Judgment affirmed.

SCHULTZ, Appellant, vs. FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY and others, Respondents.

December 10, 1912—January 7, 1913.

Conspiracy: When actionable: "Open or rough shadowing:" Bringing person into public disrepute: Preventing freedom of action: Aggravating circumstances: Joint and several liability: Acts of one conspirator binding on all: Liability of master for torts of servant: Evidence: Weight and sufficiency: Mitigation of damages: Conclusions of fact: Leading questions.

1. One who has knowledge that detectives in his employ or under his control propose to engage in "open or rough shadowing" of a person under surveillance, and consents thereto, cannot escape liability therefor on the plea that he did not know what the term meant.
2. A conspiracy to libel a person or to commit any other wrong to his person, reputation, or property may, when damage follows, be the subject of a civil action.
3. "Open or rough shadowing," which consists in openly and publicly following and watching a person, being calculated to publish him as suspect and to bring him into public disrepute, ridicule, and contempt, is an unlawful act, and a conspiracy to do such act is actionable.
4. When such open or rough shadowing is accompanied by acts of trespass such as entry into plaintiff's house and pursuing him into his attorney's office, and by threats, insults, eavesdropping, and ambiguous and uncalled-for communications with his employer, these constitute circumstances of aggravation for which the persons taking part in the conspiracy are liable.
5. In such a case the evidence of the defendants as to what their purpose was in the surveillance is not conclusive on the court or jury, but the plaintiff may show by circumstantial or other evidence, and the jury may find therefrom, that the purpose was different from that claimed.
6. The liability of conspirators to civil damages is joint and several, and, when the existence of a conspiracy has been shown *prima facie*, the plaintiff may give in evidence as bearing upon his damages the acts and sayings of any conspirator done or spoken in pursuit of the common purpose, whether that conspirator be a party or not.
7. Such acts and sayings are evidence against other conspirators, not under the rule *respondeat superior*, but under the law of

conspiracy, which makes each the agent and spokesman of all engaged in the unlawful enterprise. The plaintiff may, however, invoke either rule for the purpose of connecting any of the parties with the tort.

8. A purpose to prevent a person from leaving the state or the city of his residence until it is determined whether or not to have him arrested, is in itself not a lawful purpose to be undertaken by private individuals.

9. Surveillance for such purpose, if maliciously done, is a violation of sec. 4466*a*, Stats., and gives to the injured party a cause of action.

10. In an action for damages for a conspiracy to injure plaintiff by open and rough shadowing, defendants may show in mitigation of damages that their intentions were good, that the acts complained of were done without malice and in pursuance of a supposed legal duty, or that the plaintiff's reputation was so bad that the acts of the defendants were not likely to injure him much, if at all; but such facts do not constitute a justification or defense.

11. Conclusions of fact are not always inadmissible in evidence. So far as they relate to collateral facts not directly in issue, they often save much delay and circumlocution, and hence should not be too rigidly excluded; and the same is true of leading questions.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

For the appellant there was a brief signed by *Charles Friend,* attorney, and *W. B. Rubin* and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Rubin.*

For the respondents there was a brief by *Doe & Ballhorn* and *Paul D. Durant,* and oral argument by *J. B. Doe.*

TIMLIN, J. This action is against an employers' liability insurance company, its resident agent, *Julius Bacher, Frederick P. Gordon,* the manager of the Riemer National Detective Bureau, an incorporated private detective agency, and *John Paczkowski,* a private detective in the employment of said detective agency. The plaintiff, whose real name is *Anton Sobjak,* had a stepfather named Schultz, and he as-

sumed the latter name and has been known by it for about eighteen years. He was a laborer thirty-seven years of age, and with his wife and four children resided some distance from the business or down-town district in Milwaukee in a house about nine feet back from the sidewalk, having a hallway used as an entrance to plaintiff's and other apartments in the same house. He had been convicted of larceny once and pardoned, and had been addicted to strong drink. In an action for damages in which the insurance company defendant was interested as insurer, *Anthony Schultz* had been called as a witness and testified on the part of the plaintiff. There was in that case a verdict for the plaintiff, and a motion for a new trial was pending therein in March, 1910. The defendants are charged in the complaint with a conspiracy for the purpose of annoying, harassing, and intimidating the plaintiff in order to get him to leave the city of Milwaukee and refrain from testifying as a witness in said action in case a new trial should be granted therein.

It is averred that for the purpose of carrying out this conspiracy and in furtherance thereof the defendants caused the plaintiff to be followed and shadowed, keeping him under constant surveillance day and night, and also set men to watch plaintiff's home and to eavesdrop upon his home, threatened him with great bodily violence, induced his employer to discharge him, and gave out and made known to plaintiff's neighbors that plaintiff was being watched and shadowed, threatened plaintiff with criminal prosecution, and gave out and threatened that they would cause him to disappear and be kidnaped. That defendants thereby falsely imprisoned the plaintiff and restrained him of his liberty. It is then averred that by reason of these wrongful acts the plaintiff was put in great fear and mental anguish and prevented from coming and going as he pleased, and his reputation and good name defamed, to his injury in all in the sum of $5,000.

The pleading is not well or skilfully drawn, but it is suffi-

cient under the liberal rules of pleading obtaining in this state, and it is believed the foregoing is a fair synopsis of its contents. The defendants answered to the merits, denying the conspiracy and the wrongful purpose alleged, admitted that the defendant *Bacher,* for and on behalf of the defendant insurance company, employed the said detective agency to keep watch of the plaintiff, and that the defendant *Paczkowski,* under directions of and as an employee of this detective agency, did watch the plaintiff.

On the part of the plaintiff evidence was introduced tending to show that the insurance company employed the detective agency, that *Bacher* and *Gordon* took part in discussing the subject, and that the defendant *Gordon,* representing the detective agency, advised rough and open shadowing of the plaintiff, and that this kind of shadowing was employed, to the knowledge of all the defendants and with their consent. Rough shadowing means that those engaged in so doing are not obliged to conceal the fact that the subject of surveillance is being shadowed or followed, but it is done so openly that the subject or the general public or both may know of it. The employees of the detective agency were told by defendant *Gordon* to do open or rough shadowing in this case, as he states, upon the presumption that plaintiff would know he was being shadowed and it would have the moral effect on him of keeping him in town. It appeared that the defendant *Paczkowski,* an employee of the detective agency, co-operating with another employee of this agency named Heyer, about March 7, 1910, as directed by the defendant *Gordon,* with the consent and at the instigation of the defendant *Bacher* and the insurance company, took up the work of shadowing the plaintiff. There is testimony offered on the part of the plaintiff tending to show that these two employees of the said detective agency were acting together in pursuance of a common purpose, were under the directions of *Gordon,* manager of the agency, who contracted for this purpose with the in-

surance company through *Bacher,* another agent of that company, and they made daily reports to *Gordon,* who transmitted them to the representatives of the insurance company, so that all defendants were at all times operating and acting and counseling together in pursuance of a common design and with a common purpose. Heyer, while occupying this attitude to plaintiff, entered plaintiff's house unbidden, threatened the plaintiff, entered plaintiff's yard, and one or both intruded upon plaintiff's premises several times, tiptoeing into the hall, apparently listening at the doors and retreating when the doors were opened. The plaintiff said:

"They kept coming and annoying us day by day. They kept opening the doors, the hallway doors, five or six different times, and looking into the hallway. They opened doors on different days. When he [Heyer] opened the door he would say, 'Get in there.' He would look smiling when he said 'Get in there.' "

The other man, *Paczkowski,* told the plaintiff that if he would not go out of town he would fix him up. Heyer also told the plaintiff he was under arrest. Heyer carried a "gun" in his hip pocket. *Paczkowski* was seen by the witness Robanski eavesdropping on the stairway leading into plaintiff's house at 11 o'clock p. m. Pinkolski also saw them, and they made themselves and their watch in front of plaintiff's house so constant, conspicuous, and notorious that on one occasion a crowd of some 200 persons collected and threatened violence. According to Polaski, Heyer, while engaged in watching, told the witness he was watching *Tony Schultz* and there was some silverware missing from a boat, and Heyer showed witness a star and said he (*Schultz*) is in arrest. This witness also saw Heyer go into *Schultz's* house and saw the crowd assembled. Mary Denbowski lived in the next house to plaintiff, and she gave similar testimony of acts which the jury under proper instructions might have found to constitute eavesdropping.

From the beginning of this rough shadowing, so called, the plaintiff was followed openly and persistently by two detectives who made daily reports to the defendant *Gordon,* manager of the detective agency, and these reports were by the latter turned over to the insurance company and *Bacher.* After calling the attention of all the plaintiff's neighbors to the fact that he was being watched, threatening him, eavesdropping upon his premises, and making themselves unnecessarily conspicuous passing up and down on the sidewalk in front of his house, they were requested to let the man alone and were told that they were annoying him; that he was complaining of their presence. The subordinate detectives refused to do so and told Mr. Foster, who made the request, that it was none of his business. *Mr. Gordon,* as a witness on the stand, meets that situation in this way: "Answer. I don't believe I gave much thought to any instructions that the men may have said they received from you and Foster; we were hired to do what we were asked to do and we did it." Mr. Foster, an attorney at law employed in Mr. Rubin's office, went out to the residence of the plaintiff on Greenbush street several times and remonstrated against this treatment of plaintiff; the last time he went for the purpose of bringing the plaintiff down town to Rubin's office. When Foster and the plaintiff started these two detectives followed, entered the same street car, and followed them into the Plankinton House, where Mr. Foster went to use the telephone, from there onto the street, from there into Mr. Rubin's office, where *Schultz* was attempting to consult with his attorney, being brought there by Mr. Foster for that purpose. *Paczkowski* entered the office, was requested by Rubin to leave, but did not leave at once upon such request; after a short time he went out in the hall and remained near the door and Mr. Rubin came out and ordered him away, when an affray took place between this man and Rubin. Mr. Rubin, Mr. Foster, and *Mr. Schultz* then went to the police headquarters of the city of Milwaukee

for the purpose of making complaint against this annoyance and the detective followed them there; there appeared *Mr. Gordon,* and there they were refused protection by the lawful police of the city on the absurd ground that the detective agency was incorporated. They then began this action by service of a summons and affidavit for examination, and the defendants or some of them had a meeting and resolved to continue the rough shadowing after the affidavit was served upon them, and they did so.

A verdict was directed for the defendants and the appellant contends this was error. His counsel is somewhat vague with reference to what particular rule of law existing for the protection of persons was breached by the acts and combination of defendants, and suggests that the combination and conduct complained of was for the purpose of carrying out, to the damage of plaintiff, that species of disorderly and unlawful conduct called eavesdropping, or constituted such restraint of plaintiff's liberty as to amount to false imprisonment, or that it was an invasion of a right to privacy or constituted an injury to the reputation. The respondents seek to support the judgment upon the broad ground that the open shadowing or surveillance of plaintiff by persons not officers of the law, for the purpose of keeping themselves informed of his whereabouts for a time and until such private persons determine whether or no they will apply for a criminal warrant against the person shadowed or watched, is not an actionable wrong; hence that combination or confederacy for such purpose, where no unlawful means are resorted to in carrying it out, is not actionable. On the part of *Bacher* and the insurance company it is claimed that the detective agency was employed to shadow the plaintiff because it was believed he had given false testimony in the case mentioned, and they were waiting for the outcome of the pending motion for a new trial, when they would determine whether they would apply for plaintiff's arrest upon a charge of perjury, and

that in the meantime plaintiff might leave town, and this last they intended to prevent or to keep themselves informed of. They denied positively and categorically all combination for any purpose other than that above mentioned. On the part of *Gordon* and *Paczkowski* it is claimed they were employed to follow and watch, in other words to shadow the plaintiff, and that it was left to *Gordon* to decide whether this shadowing should be open or secret, that he selected the rough or open method as most effective to prevent plaintiff leaving town, and beyond this *Gordon* and *Paczkowski* deny all charges of threats, eavesdropping, or other improper conduct, but apparently make the broad claim that when employed to do so they may rough-shadow any person with impunity. The defendants other than *Gordon* and *Paczkowski* had knowledge that the process called open or rough shadowing was to be employed or was being employed and consented to it. There is some claim made that these other defendants did not know what rough or open shadowing meant, but it was their duty to know before they entered into a combination to carry it out or before they countenanced it. It is not the law that one may enter into a combination to "maroon" or to "burke" a man and afterward go free on the ground that he did not know what was meant by these unusual words. In any event, whether they knew or not was a question for the jury.

Omitting for the present all alleged acts of trespass or eavesdropping and all alleged threats and slanderous words and all alleged restraint of plaintiff's liberty, is any personal right violated by openly and publicly following and watching one? To publish of and concerning a person words, pictures, or signs which have a tendency to bring that person into public disrepute or into public ridicule, contempt, and disesteem is an actionable wrong to his reputation. *Bradley v. Cramer*, 59 Wis. 309, 18 N. W. 268; *Moley v. Barager*, 77 Wis. 43, 45 N. W. 1082; *Solverson v. Peterson*, 64 Wis. 198, 25 N. W.

14; *Wandt v. Hearst's Chicago American,* 129 Wis. 419, 109 N. W. 70. It can scarcely be doubted that the publication of a cartoon showing the plaintiff followed and watched by detectives, who pursue and watch him by day and stand guard on the sidewalk in front of his house at night, would, within the principle of the foregoing cases, be an actionable libel—an injury to plaintiff's reputation. How then can it be said that the acts which the picture represents, accompanied with equal publicity, do not constitute an injury to reputation? Can we say they are actionable when represented by picture but nonactionable when actually committed? It must be conceded that to publicly proclaim one suspect, to publicly charge that he deserves watching and that he is being followed and watched, does subject him to public disrepute, ridicule, and contempt. If so, the acts here complained of are the analogue of libel except the writing, printing, and passing around. But these elements are supplied by the public, notorious, and continued character of the surveillance. We must hold that rough or open shadowing as here described and defined is an unlawful act resulting in legal injury to the reputation of the person who is the object of such attentions. Actual pursuit and public surveillance of person and home are suggestive of criminality fatal to public esteem and productive of public contempt or ridicule. So, without taking up the question of secret surveillance, which is not before us, we are impelled to hold that on this ground a case was made for the jury. A conspiracy to libel the plaintiff or to commit any other wrong to his person, reputation, or property may, when damage follows, be the subject of a civil action. *White v. White,* 140 Wis. 538, 122 N. W. 1051; *Jones v. Monson,* 137 Wis. 478, 119 N. W. 179; *Fisher v. Schuri,* 73 Wis. 370, 41 N. W. 527; *Smith v. Nippert,* 76 Wis. 86, 44 N. W. 846.

There is in this case also testimony tending to show, and which, if believed by the jury, would show, circumstances of

aggravation, consisting of accusations, threats, trespass, eavesdropping, insults, and ambiguous and uncalled-for communications with plaintiff's employer. The defendants so far misconceive the plaintiff's rights and their power as to seek to justify their entry or entries into plaintiff's house, and their pursuit of him even into his attorney's office, upon the ground that in the one case they wished to identify the plaintiff and in the other to keep him in sight, and aver that their conduct was civil and proper on each occasion. They knew they were uninvited and unwelcome, that they were adversary to the plaintiff, and they cannot justify the invasion of his home or the pursuit of the plaintiff into his attorney's office upon any such grounds. Neither place was public or open to the defendants. Each place was a sanctuary to the plaintiff as against his legally unauthorized pursuers. The defendants present this case as if their evidence relating to the purpose of the surveillance was conclusive upon the court below and the jury. Not so. The plaintiff may show by circumstantial or other evidence that the purpose claimed by defendants was not their true purpose, even in a case where the purpose claimed by defendants is a lawful purpose. In the instant case it is difficult to see how the acts testified to on the part of plaintiff could have the effect of inducing him to remain in town. Making it unpleasant for a man may have the effect of keeping him in town, but the jury would have the right to draw the opposite conclusion as to whether the acts took place, as to their effect, and as to the real intention of defendants. The plaintiff testified that one of the detectives told him to get out of town. The jury would have been justified in finding from the evidence, notwithstanding the positive testimony of defendants with reference to their purpose, that it was the intention of the defendants to drive the plaintiff out of town.

It is argued that neither the detective agency nor Heyer are made parties defendant, hence that the plaintiff has not

the right to complain of unlawful actions on the part of Heyer. But the liability of conspirators to civil damages is joint and several, and, a conspiracy being shown *prima facie,* the plaintiff may give in evidence the acts and sayings of any conspirator done or said in furtherance of the common purpose, whether that conspirator be a party defendant or not. 8 Cyc. 659, 660, 680 and cases in note 76. It is argued that the defendant *Gordon* was not master of *Paczkowski* or Heyer, but was like them an employee of the detective agency, and that the insurance company and *Bacher* were not responsible for excess of zeal or excess of authority on the part of Heyer or *Paczkowski.* This is also an erroneous view of the law. When persons are charged as conspirators and a *prima facie* case of conspiracy is shown, the acts and sayings of each conspirator, whether a defendant or not, in furtherance of the unlawful conspiracy, is evidence against his co-conspirator, not under the rule *respondeat superior,* but under that rule of the conspiracy law which makes each the agent and spokesman of all in the unlawful enterprise. The plaintiff in a suit for civil damages caused by conspiracy may invoke, for the purpose of connecting any person with the tort, either the rule *respondeat superior* or the rule above stated relative to the acts and admissions of conspirators, and this is so elementary as not to require the citation of authority in its support. In this case there is evidence tending to hold the defendants *Gordon* and *Bacher* under the conspiracy rule, and the defendant insurance company under this same rule as well as under the rule *respondeat superior. Daley v. C. & N. W. R. Co.* 145 Wis. 249, 129 N. W. 1062, and cases cited.

Passing from detail to a larger view of the evidence for the defense. Defendants attempt to justify by stating that their purpose was to prevent plaintiff leaving town until they had determined whether or not to have him arrested. This in itself is not a lawful purpose. The defendants are not public officers. So far as the enforcement of the criminal laws is

concerned they have no duties except those common to all private citizens. A statute of this state provides:

"Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished," etc. Sec. 4466*a*, Stats.

Preventing or hindering one from leaving town is preventing or hindering him from doing or performing a lawful act. Whether or not this last is maliciously done is a question for the jury. If this criminal statute has been violated to the damage of the plaintiff, a cause of action accrued to him from such violation. *Randall v. Lonstorf*, 126 Wis. 147, 105 N. W. 663, 3 L. R. A. N. S. 470, note.

The testimony given by the defendants, while not constituting a defense, is however competent in mitigation of damages. If they can satisfy the jury that their intentions were good, that they lacked malice, that they mistakenly thought they were performing a legal duty, or that the plaintiff's reputation was so bad that the wrongful acts of the defendants were not likely to injure him in any degree or in any great degree, all this may be taken into consideration in mitigation of damages; but so long as the law is just and impartial we cannot accept the testimony of the defendants here as justification, unless we are ready to concede that any person or corporation may employ private detectives for the purpose of openly and continuously following and watching another person, and any private detectives in pursuance of such employment may openly and publicly follow and watch a man and commit the acts which the evidence here tends to show were committed. It is hardly necessary to say that this extraordinary privilege is not possessed by any private person at

common law, and, as we have seen, the attempted exercise thereof constitutes a legal injury to reputation.

The learned counsel for respondents calls the plaintiff a "self-confessed perjurer, drunkard, and convict," and argues that his testimony is not entitled to credence. We cannot so easily dispose of the case. In the first place the right of action does not rest solely upon plaintiff's testimony; second, the question of credibility of the plaintiff is for the jury; and third, we have in this state a government of law, and there is none so lowly and weak as to be beneath its protection and none so high and powerful as to be above its restraints.

The judgment in this case must be reversed because of the error of the learned circuit court in directing a verdict for defendants, and we take occasion to say that the court below was unduly technical in the exclusion of evidence. The plaintiff was denied the privilege, on examination of the defendant *Gordon* as an adverse witness, of inquiring whether or not he had anything to do with the garnishment of plaintiff's wages; denied the right to ask this witness what effect he intended to produce upon the plaintiff by open shadowing; denied the right to ask whether there was a warrant issued for plaintiff in the alleged contemplated perjury prosecution; denied the right to show by the witness Foster that *Schultz* and his wife were greatly agitated; denied the right to show by the same witness that the appearance of the detectives when remonstrated with was overbearing; denied the right to show by the same witness whether the neighbors of *Schultz* made complaint to him about the presence of the detectives; denied the right to show that the neighbors talked to Foster about the presence of the detectives; struck out the statement of Foster that in the struggle between Rubin and the detective in the hall the detective proved the stronger man; denied the right to prove that the police officer applied to for protection stated in the presence of *Gordon* that he could not arrest the detectives without a warrant; struck out the statement of

the witness Polazik that the plaintiff "was arrested pretty near;" struck out the statement of the witness Pinkalski that after his first conversation with the detectives he did not talk any more because he was afraid somebody would get killed; struck out the statement of Robanski that the plaintiff was afraid, was scared when informed by Robanski what the detectives said to the latter about somebody disappearing; struck out the statement of the plaintiff that when the detective came into his house at 8 o'clock in the evening plaintiff's wife and four children were present; also the statement of the plaintiff that the detectives kept hounding him all the time; also sustained an objection to a question put to *Bacher* as an adverse witness asking whether the shadowing or some part of it was with his approval and consent.

Conclusions of fact are not always inadmissible, and so far as they relate to collateral facts not directly in issue save much delay and circumlocution. The same is true of leading questions. Ordinary conversation and ordinary writings abound in conclusions of fact. Most of these are permissible in testimony. To refuse to permit a witness to testify that one appeared "frightened" or "insolent" or "overbearing" or "enraged" has the effect merely of shutting out the testimony of all eye-witnesses of these conditions who have not extraordinary powers of description. Cross-examination will in all such cases sufficiently disclose what bases the witness has for his conclusion. It is hoped that these errors will not be repeated.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

HOLYOKE, Appellant, vs. MILLMANN, Respondent.

December 10, 1912—January 7, 1913.

Corporations: Sale and transfer of stock: Duty of secretary as to transfer on books.

1. It is not the duty of the secretary of a corporation, and he may properly refuse, to transfer stock on the books of the corporation when there is a *bona fide* claim on the part of the corporation that the person seeking to have the transfer made is not and never was a stockholder, and especially when it seems reasonably certain that the corporation is right in such contention.
2. It was not the purpose of the legislature in enacting sec. 1752, Stats. (1898), to permit the secretary of a corporation to disturb the *status quo* while a contest was pending or was being carried on by rival claimants for stock.
3. One who had at best an executory contract with a corporation for the purchase of stock therein, attempted to assign to another the right to purchase a part of such stock. In form he attempted to assign the stock itself, but in fact he never owned it. The assignee was apparently obnoxious to the corporation, and it never accepted him as a stockholder. *Held*, that the secretary properly refused to make a transfer on the books of the stock so attempted to be assigned.
4. Primarily a corporation, when it offers its stock for sale, has the right to select the purchasers.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

On April 10, 1910, the petitioner filed an affidavit in circuit court for Milwaukee county under the provisions of sec. 1752, Stats. (1898), and procured from said court an order directed to *Joseph C. Millmann,* secretary of the Stegeman Motor Car Company, to show cause why he should not be required to transfer certain stock on the books of the corporation.

The petition alleged that one John W. Mapel purchased and paid for forty shares of the capital stock of the Stegeman Motor Car Company; that thereafter said company delivered to Mapel certificates for twenty-five shares of the stock, but

refused to issue certificates for the remaining fifteen shares; that Mapel, for a valuable consideration, assigned fifteen shares of said stock to the petitioner, and that petitioner delivered to *Joseph C. Millmann,* as secretary of said company, the original written assignment of said shares of stock and requested that such transfer be made.

In his answer respondent alleged that the Stegeman Motor Car Company agreed to sell forty shares of stock to John W. Mapel, and that on March 28, 1912, said company received a letter from Mapel containing three checks, namely, that of John W. Mapel for $1,500, check of John J. Mapel for $1,000, and check of *S. A. Holyoke,* the petitioner, for $1,500, with instructions that fifteen shares of the stock be issued to John W. Mapel, ten to John J. Mapel, and fifteen to *S. A. Holyoke;* that stock certificates as requested were issued to John W. Mapel and John J. Mapel, and the check of *S. A. Holyoke* was returned to John W. Mapel, and he was informed that neither the respondent nor any officer of the corporation had authorized the issue of any stock to *S. A. Holyoke.* The answer further alleged that the assignment referred to was of no force or effect, for the reason that the assignor named therein was not at the time of the execution thereof nor at any other time the owner and holder of a certificate of fifteen shares of such capital stock purported to be assigned thereby, nor was the said John W. Mapel entitled to have the same issued to him, for the reason that he had not paid therefor, and for the further reason that there was no agreement between Mapel and the said company for the purchase of the stock; and further, that petitioner did not present to respondent as secretary of the above named company a certificate for such shares of stock properly indorsed by John W. Mapel, as required.

A hearing was had on the order to show cause and testimony was introduced. The application of the petitioner was

denied, and from the order denying such application this appeal is taken.

For the appellant there was a brief by *Stover & Stover,* and oral argument by *John B. Stover.*

Charles F. Millmann, for the respondent.

BARNES, J. The secretary of a corporation performs a ministerial duty in transferring stock by virtue of the provisions of sec. 1752, Stats. (1898). *In re Klaus,* 67 Wis. 401, 29 N. W. 582. He is not a trier of controversies that should be settled in the courts. He is required by the statute to make a transfer only when "it is his duty" to do so. It is not his duty to make the transfer when there is a *bona fide* claim on the part of the corporation that the person seeking to have the transfer made is not and never was a stockholder. Much less is it his duty to make the transfer when it seems reasonably certain that the corporation is correct in its contention. It was not the purpose of the legislature in enacting sec. 1752 to permit the secretary of a corporation to disturb the *status quo* while a contest was pending or was being carried on by rival claimants for stock. The courts were left free to deal with the subject of the controversy *pendente lite,* as well as to make final disposition of it. It is hardly necessary to cite authorities to show that the courts are the proper tribunals in which to settle questions of title to corporate stocks.

To say that the corporation had substantial grounds for insisting that the petitioner was not one of its stockholders is putting it mildly. The question whether the contract to purchase the stock was void under the statute of frauds was involved. If it was found that the contract was void, the question whether there had been sufficient part performance to avoid the statute became material. Primarily a corporation, when it offers its stock for sale, has the right to select the

purchasers. It may sell to one man and refuse to sell to another. Generally it desires to interest men of means and of good reputation and shuns crooks and cranks. Certain stockholders may be a decided advantage in a business way while others may not be. Undesirable stockholders may be and frequently are as troublesome as undesirable partners, and harder to get rid of. *Katz v. De Wolf, ante,* p. 337, 138 N. W. 1013. Mapel, at best, had but an executory contract for the purchase of stock to the amount of $4,000. As a matter of fact he never purchased that amount. What he attempted to do in reality was to assign to the petitioner his right to purchase $1,500 of the stock covered by the alleged agreement. It is true that in form he attempted to assign the stock itself, but he never owned it. The minds of the parties never met on accepting *Holyoke* as a stockholder and he never was accepted. Unless Mapel had a right to foist an apparently obnoxious stockholder on the corporation by transferring an interest in his executory agreement to buy stock, no rights were acquired by *Holyoke.* On this point attention is called to *Johnson v. Vickers,* 139 Wis. 145, 120 N. W. 837; 3 Page, Contracts, sec. 1262; and 4 Cyc. 22. Enough has been said to show that the case was one where the secretary very properly refused to make a transfer of the stock. The corporation was entitled to its day in court to show if it could that it was within its rights when it refused to accept petitioner as a stockholder.

By the Court.—Order affirmed.

LANZ-OWEN & COMPANY, Appellant, vs. GARAGE EQUIPMENT MANUFACTURING COMPANY, Respondent.

December 10, 1912—January 7, 1913.

Foreign corporations: Contracts: Validity: Right to hold real property: Removal of disability: Relation: Validating deed or lease: Limitation upon action or defense: Statutes construed.

1. Under sec. 1770*b*, Stats., the contract of a foreign corporation which has not complied with that section, affecting the personal liability of such corporation or relating to property within this state, is void only at the election of the party dealing with the corporation. Neither the corporation nor its assigns can enforce the contract against the other party; but such party may affirm or disaffirm it at his election. TIMLIN, J., dissents.
2. By subsec. 1 of sec. 1770*j*, Stats. (Laws of 1911, ch. 142), the disability of a foreign corporation, coming within the terms of the act, to hold real property within this state which it had acquired or attempted to acquire as there stated, was removed from the time the act took effect; but such removal did not relate back to the date of the deed or lease under which the corporation claimed title, nor validate such instrument from its inception.
3. Subsec. 2 of said sec. 1770*j* limited to one year after the act took effect the time within which any person claiming that the legal title to real property was invalid by reason of the failure of any corporation coming within the terms of subsec. 1 to comply with sec. 1770*b* might commence an action or interpose a defense on such grounds; and such limitation, being a reasonable one, was within the power of the legislature.
4. The right to commence such action or interpose such defense was not limited to a person who had contracted with the corporation.
5. A "corporation coming within the terms of subsection 1" was one that had acquired or attempted to acquire legal title by deed or lease to real property in this state before complying with sec. 1770*b*, and which thereafter complied with that section before the enactment of sec. 1770*j*.
6. The words "legal title" in subsec. 2 of sec. 1770*j* refer to the same subject as do the same words in subsec. 1, namely, a legal title by deed or lease.

7. Real property in this state was leased by the owner to a foreign corporation which had not complied with sec. 1770*b*, Stats., but which thereafter complied therewith before sec. 1770*j* took effect. After sec. 1770*j* took effect the corporation sued one who, it alleged, had unlawfully withheld from it the possession of the leased property. Within a year after sec. 1770*j* took effect the defense was interposed that the lease to plaintiff was invalid because given before plaintiff had complied with sec. 1770*b*. *Held*, on demurrer, that such defense was good.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Plaintiff, a foreign corporation, on the 30th day of April, 1910, entered into a written lease with the owner of a building situated in Milwaukee, a part of which was occupied by the defendant, for three years commencing on the 1st day of April, 1910. Plaintiff claims defendant's lease of the premises in question expired May 1, 1910. On said date it notified defendant of its lease and demanded possession of the portion of the premises held by defendant. Possession was refused and withheld from plaintiff from May 1 to July 1, 1910. This action, begun on the 5th day of July, 1911, is brought to recover damages caused by the alleged unlawful detention of the premises by the defendant.

As a first defense to the cause of action the defendant alleged upon information and belief that prior to the 25th day of June, 1910, the plaintiff had in no wise complied with any of the provisions of sec. 1770*b*, Stats., and acts amendatory thereof, alleging the same in detail, and that by reason of a noncompliance therewith it was not at any time prior to the 25th day of June, 1910, authorized or licensed to lease or hold real estate or to transact business in the state of Wisconsin; that the lease set forth in the complaint, if made at all, was made, and delivered to plaintiff within the state of Wisconsin, prior to the 25th day of June, 1910, and before plaintiff had complied with the requirements of sec. 1770*b*, Stats., and the acts amendatory thereof, and that the same

was null and void and ineffective to give plaintiff any right to the possession of the premises mentioned in the complaint. The first defense also contained allegations to the effect that during the month of November, 1910, plaintiff brought an action against the defendant in the circuit court for Milwaukee county to recover damages for the same wrong complained of by it in the present action; that after a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action had been overruled, by consent of both parties the action was duly discontinued on the 27th day of March, 1911.

Plaintiff demurred to the first defense on the ground that it appeared upon the face thereof that it did not constitute a defense. From an order overruling such demurrer it appealed.

For the appellant there was a brief by *Lines, Spooner, Ellis & Quarles,* and oral argument by *Fred C. Ellis.*

For the respondent there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. E. Monroe.*

VINJE, J. The issue raised by the demurrer calls for the construction of ch. 142, Laws of 1911, as amended by sec. 12, ch. 664, Laws of 1911. The enactment is as follows:

"Section 1. There is added to the statutes a new section to read: Section 1770*j*. 1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

"2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such

corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of subsection 1 of this section to comply with section 1770*b* of the statutes, or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this section shall not affect any action now pending.

"Section 2. This act shall take effect and be in force from and after its passage and publication."

The plaintiff contends that this amendment to sec. 1770*b*, Stats., relieves from disability any corporation that, before its passage, complied with sec. 1770*b*, and that such removal of disability relates back to the date of the instrument through which legal title was acquired or attempted to be acquired, and validates the instrument from its inception. Hence that plaintiff, having complied with sec. 1770*b* on June 25, 1910, had its disability to lease property within this state removed as of the date of its lease, to wit, April 30, 1910, and was therefore entitled to the possession of the premises in question on May 1, 1910, when defendant's lease expired.

The correctness of this contention must be tested by the language and manifest purpose of the amendatory act. Prior to its passage every contract made by or on behalf of any foreign corporation included in sec. 1770*b* affecting the personal liability of such corporation or relating to property within this state, before it had complied with said section, was wholly void on its behalf and on behalf of its assigns, but was enforceable against it or them. Reference to the decided cases affected by this section shows that the contract entered into is not absolutely void. *Ashland L. Co. v. Detroit S. Co.* 114 Wis. 66, 89 N. W. 904; *Beaser v. Barber A. P. Co.* 120 Wis. 599, 98 N. W. 525; *Allen v. Milwaukee,* 128 Wis.

678, 106 N. W. 1099; *Duluth M. Co. v. Clancy,* 139 Wis. 189, 120 N. W. 854; *Rib Falls L. Co. v. Lesh & M. L. Co.* 144 Wis. 362, 129 N. W. 595; *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080. In the first case cited, the proper limitation is found on page 78 of the opinion by declaring it a nullity in so far as it is sought to be enforced on behalf of the foreign corporation by way of counterclaim. In the last case cited, language declaring it void without limitation is used, but the court was dealing with a case in which a foreign corporation sought to assert the validity of its deed, and it was held that plaintiff, though not a party to but affected by it, could invoke the aid of the statute. The decision upon this branch went no further. The contract is void only at the election of the party dealing with the corporation. Neither the corporation nor its assigns could enforce it against the other party. But such party may affirm or disaffirm the contract at his election. And as the law stood prior to the amendment of 1911, no period of limitation within which such right of affirmance or disaffirmance must be exercised was prescribed. By the first subsection of the amendment the disability of a foreign corporation that previous to the amendment thereof had complied with sec. 1770*b* was removed so far as it related to the acquisition and holding of property acquired or attempted to be acquired. The language is, such corporation "shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired." But such removal of disability dates from and after the time the act took effect. It does not relate back to the date of the contract, much less validate the contract from the time it was made. The effect of the first subsection is to remove, from the time the act takes effect, the disability of a foreign corporation coming within its provisions, to hold property within this state. It says nothing as to the validity

or invalidity of any contract previously entered into relative to the same. The presumption obtains, except as to some mere remedial statutes, that, unless the contrary clearly appears, enactments have only a prospective effect. *Chicago T. & T. Co. v. Bashford,* 120 Wis. 281, 97 N. W. 940. That there was no legislative intent to validate past contracts is evidenced by subsection 2, which provides a period of limitation of one year within which a party who has entered into any contract with a foreign corporation coming within the provisions of subsection 1 of the act, namely, one that at the time of entering into the contract had not complied with the provisions of sec. 1770*b,* but which before the passage of the amendment in 1911 had complied therewith, may begin an action to disaffirm the contract, or set up a defense to a contract, on the ground that sec. 1770*b* was not complied with. Had the legislature conceived that the legal disability to hold property was removed from the date of the contract, or that the contract by force of the amendment became valid from the time of its execution, there would have been no necessity or reason for providing a period of one year within which it might be defeated by action or defense. As the law stood before the passage of the amendment, such action might be instituted, or defense set up, at any time. After such amendment took effect, it could be begun or set up as to corporations coming within the provisions of subsection 1 only within a year thereof. In other words, the legislature prescribed a period of limitation within which the right to disaffirm should be exercised as to corporations within its provisions. Foreign corporations failing to comply with sec. 1770*b* previous to the amendment are unaffected thereby. As to them the limitation of one year does not apply.

It follows, from the provisions of the amendment and the original act, that if a year elapses within which no action is begun or defense set up by the other party, then as to corporations within its provisions the contract becomes valid on

behalf of the corporation, and it will be protected in the rights it then enjoys, or is then entitled to, under the contract. The amendment, after the expiration of the period of limitation fixed by it, protects a corporation coming within its provisions in the rights which it has possessed and enjoyed under its contract previous thereto. It does not create, or provide for the enforcement of, new rights relating to the past which were not then either possessed or enjoyed by the corporation. It makes no contract for the parties, nor does it allow the corporation to insist upon the validity of contracts already made, unless the other party fails to disaffirm or set up a defense to the contract within the year. In other words, it leaves the contract made just as it was, except that it provides that the right of the party dealing with a corporation, that is within the amendment, to disaffirm the contract must be exercised within the year, otherwise it shall be deemed to be binding upon him.

A party dealing with a foreign corporation that had not complied with sec. 1770*b* did not agree to become bound absolutely. He entered into such contract with the right reserved to enforce or disaffirm it at his election. The amendment has not cut off such right of election, but has merely prescribed a reasonable period within which it must be exercised. The power of the legislature to prescribe a reasonable time within which rights may be enforced is unquestioned. It is also evident that a period of one year is a reasonable time within which to exercise the right of election to disaffirm.

It follows that the plaintiff had no contract which it could enforce at the time the defendant held possession of the leased premises; that, never having possessed or enjoyed any right thereunder as against the defendant after its disability to hold property in this state was removed, the defendant, though treated as a trespasser, violated no legal rights of the plaintiff. Subsection 2 of the amendment specifically permits it to set

up such defense within a year. The language is, "any person" claiming that the legal title is invalid by reason of the failure of any corporation coming within the amendment to comply with sec. 1770*b* shall commence action or interpose a defense within a year. The right to do so is not limited to the party contracting with the corporation. *Hanna v. Kelsey R. Co.* 145 Wis. 276, 129 N. W. 1080. Here the defendant has set up such a defense within the year.

Plaintiff's contention that subsection 2 does not apply to a corporation that has complied with sec. 1770*b* before the enactment of the amendment is manifestly untenable. It is just to such a corporation that it does apply. The language is, "the failure of any corporation coming within the terms of subsection 1 of this section." A corporation coming within the terms of subsection 1 of the section is one that acquired or attempted to acquire property within this state before it complied with sec. 1770*b* and that had complied therewith prior to the passage of the amendment. Likewise, its claim that subsection 2 does not apply to leases because it does not mention them, has no support. The language of subsection 1 is, "having acquired, or attempted to acquire, legal title by deed, or lease;" that of subsection 2 is, "claiming that the legal title" is invalid. The words "legal title" in the second subsection refer to precisely the same subject as do the words "legal title" in the first subsection, namely, a legal title by deed or lease. It was not necessary to repeat the latter words.

In disposing of this case the court has assumed that defendant had no valid lease of the premises after May 1, 1910, and that plaintiff's right to maintain the present action is not affected by the discontinuance of the former action.

By the Court.—Order affirmed.

TIMLIN, J. I concur in the decision of the court, but I do not wish to be bound by the following statements contained in the written opinion:

"The contract is void only at the election of the party dealing with the corporation. Neither the corporation nor its assigns could enforce it against the other party. But such party may affirm or disaffirm the contract at his election."

I think these statements are erroneous and contrary to previous decisions, and I fear the words will hereafter be made a basis for the claim on the part of the foreign unlicensed corporations that such contract may be validated by subsequent affirmation or by estoppel, and the statute thus frittered away.

MAEDE, Respondent, vs. BROEHM and others, Appellants.

December 10, 1912—January 7, 1913.

Cemeteries: Location: Appeal: Party not wishing to prosecute: Affirmance.

1. Sec. 1454, Stats., prohibiting the laying out or establishing of any cemetery grounds or the use of any grounds for burial purposes within fifteen rods of any habitable dwelling, is aimed at the grounds as a whole, and where a considerable part of the grounds which have been laid out and are about to be used for burial purposes are within such limit it is immaterial, in an action to restrain such use, that the particular grave dug by the defendants was more than fifteen rods from plaintiff's house.
2. The statement having been made in respondent's brief, and repeated without contradiction upon the oral argument, that one of the appellants (in this case a church corporation) had notified their attorney that it did not wish to prosecute the appeal and had requested that the same be dismissed so far as the church was concerned, and a fugitive verified statement to the same effect having been sent to this court by the trustees of the church, the court affirms the judgment against such appellant without extended or critical examination of the evidence.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an equitable action brought against *Ed. Broehm* and the *German M. E. Church* of Brillion to perpetually enjoin them from using certain grounds, located within fifteen rods of the plaintiff's dwelling house, for burial purposes in violation of the terms of sec. 1454, Stats. (Laws of 1909, ch. 29), which provides that "no person, association or corporation shall lay out or establish any cemetery grounds or use any grounds for burial purposes . . . within fifteen rods of any habitable dwelling."

The facts were that in 1894 one Jacob Broehm acquired title to a rectangular piece of land in Calumet county one and one-half acres in extent near plaintiff's premises, the east half of which was within fifteen rods of the plaintiff's dwelling house. In 1903 Jacob Broehm deeded to his sons and sons-in-law respectively seven lots, each twenty feet square, which lay side by side, separated by four-foot paths, in the north half of the said parcel. It seems that one of the lots, by reason of a mistake in the description, in fact lay outside of and just west of the parcel. All of these conveyances were conditioned that the land should be used for burial purposes and no other. Mr. Broehm reserved to himself one lot of the same size as the others which was supposed to be in the extreme northwest corner of the parcel, but, on account of a mistake in the description, was in fact just outside of and immediately west of the parcel. In 1909 Jacob Broehm by warranty deed conveyed the entire parcel, except the eight lots, for a nominal consideration to the defendant the *German Methodist Episcopal Church* of the town of Brillion, he himself being a member of that church. This deed contained no limitations or conditions as to the use of the property. This conveyance, of course, carried the four-foot paths between the lots theretofore deeded for burial purposes. The church had no cemetery of its own and made no actual use of the property for any purpose.

It is understood in the case that Jacob Broehm wished and

expected that the eight lots should be used by himself, his sons, and sons-in-law as a family cemetery. No interments have yet been made in it, however. Jacob Broehm died in November, 1910. The defendant *Edward Broehm*, one of his sons, made the arrangements for his father's funeral, which was to be and was in fact conducted by the pastor of the defendant church. After consultation with his brothers, *Edward* caused a grave to be dug in the lot in the northwest corner of the acre and a half parcel, which was supposed to be the lot reserved by Jacob Broehm for his own use. He also caused four of the lots to be staked out, and testified that it was his intention and the intention of his brothers and sisters to use their respective lots for burial purposes as they had occasion. Thereupon this action was brought, and the court upon the above facts held that the defendants *Ed. Broehm* and the *German M. E. Church* were in the act of laying out and establishing the acre and a half tract for cemetery grounds, and were preparing to use the same for burial purposes, and that such premises were within fifteen rods of the plaintiff's habitable dwelling, and granted a perpetual injunction against such use. From this judgment the defendants appeal.

For the appellants there was a brief by *Gustav B. Husting*, attorney, and *Paul O. Husting*, of counsel, and oral argument by *Paul O. Husting*.

F. M. Wilcox, for the respondent.

WINSLOW, C. J. So far as the defendant *Broehm* is concerned, there can be no doubt that the findings are amply justified by the evidence, and hence that the judgment must be affirmed. He frankly admits that it is the intention of himself and his brothers and sisters to comply with his father's wishes and use their respective lots for burial purposes; and thus that the burial of his father's body would be simply the initial interment in a family cemetery which in time would doubtless contain numerous graves. A substantial part of

this projected cemetery would admittedly lie within the prohibited fifteen-rod distance from the plaintiff's house. The fact that the grave itself was a little more than fifteen rods distant from the plaintiff's house makes no difference. The statute is aimed at the grounds as a whole, and it is unquestionable that a considerable part of the grounds which were here being laid out, established, and actually used for burial purposes were within the limit.

As to the defendant church the evidence is not so conclusive. However we do not feel called upon to examine this question critically. It is stated in the respondent's brief that the trustees of the church, before the case was called for argument, gave appellants' attorneys written notice that the church did not wish to further prosecute the appeal and requesting that the same be dismissed so far as the church was concerned. This statement was repeated in substance on the oral argument, and appellants' counsel not only did not challenge its correctness but gave the court to understand that he was in no position to do so if he would. A fugitive verified statement sent to this court by the trustees of the church is to the same effect. We cannot, of course, base official action upon this paper, and we only notice it here because it seems to place beyond doubt the statement of counsel made in court. If the church has definitely determined that it is content with the judgment of the trial court, it does not seem that we should be justified in making an extended examination of the record for the purpose of thrusting upon the church a result which it does not desire. The judgment will therefore be affirmed as to both appellants.

By the Court.—Judgment affirmed.

CITY OF OSHKOSH, Respondent, vs. CAMPBELL, Appellant.

December 10, 1912—January 7, 1913.

Municipal corporations: Action by city: Alderman as juror: Harmless error: Ordinances: Regulating use of streets: Automobiles: Law of the road.

1. In an action by a city for violation of an ordinance, where there was no dispute as to the facts and the matter at issue turned on the validity and construction of the ordinance, defendant was not prejudiced by the fact that, against his objection, an alderman of the city served on the jury.
2. A city may make reasonable police regulations respecting the use of its streets, not contravening the letter or spirit of any statute on the subject.
3. A city ordinance providing that a vehicle turning to the right into another street shall turn the corner as near the right curb as possible, is not in conflict with secs. 1636—47 to 1636—57, Stats. (Laws of 1905, ch. 305, and Laws of 1907, ch. 516), regulating motor vehicles on public highways.
4. The fact that defendant, while driving his automobile along the right-hand side of a street and intending to turn to the right into a cross street, found the way obstructed by two street cars and by people standing between them and the right-hand curb, did not justify him in crossing to and proceeding on the left-hand side of the cross street, instead of slackening his speed or stopping and waiting for an opportunity to proceed near the right-hand curb.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Affirmed.*

The defendant was prosecuted for, and by the verdict of a jury found guilty of, having violated plaintiff's ordinance requiring the driver of a vehicle in turning from a street into a cross street to the right, to make the corner as near the right-hand curb as possible. Judgment was entered accordingly. The evidence was to this effect: On the day of the occurrence defendant, in driving his automobile along the right-hand side of the street, approached a cross street, purposing to turn to the right thereinto. The streets were somewhat crowded by reason of there being a circus parade in progress. The way

at the nearest point of intersection and at the corner was obstructed by two street cars and some persons standing between them and the curb. There was a clear space to the left of the cars. Defendant chose to turn that way and go around the cars and people instead of waiting for an opportunity to proceed, keeping near the right-hand curb, according to the letter of the ordinance.

For the appellant there was a brief by *Thompsons, Pinkerton & Jackson,* and oral argument by *A. E. Thompson.*

R. A. Hollister, corporation counsel, for the respondent.

MARSHALL, J. In an action by a city to recover a penalty for violating one of its ordinances, is it prejudicial error to overrule an objection by defendant to a juror upon the ground of his being an alderman? That is the first question here. Such an occurrence characterized the trial. Whether the juror was incompetent is not the material question. It may be conceded that he was; but does it appear reasonably clear from the whole record that had he not been retained as a juror the result might probably have been more favorable for the defendant? That is the ultimate test of efficient error. It is far short of being satisfied here. The case was quite trifling, as indicated by the fact that the offense was of such character as, in the judgment of the court, to only warrant a fine of one dollar. Moreover, there was no real dispute about the facts. The matter turned on the validity and construction of the ordinance, questions with which the jurors had nothing to do. On the whole, there seems to be no indication in the record that appellant was prejudiced by the fact that the alderman served on the jury.

Did the court err in admitting in evidence and giving effect to the ordinance? The affirmative is claimed because of ch. 516, Laws of 1907 (secs. 1636—50, 1636—54, Stats.), regulating the use of highways by persons with automobiles. The plaintiff had all the usual powers respecting regulation

of the use of streets within its boundaries. It is not claimed that the particular regulation violated any statute unless it be the one referred to or ch. 305, Laws of 1905 (secs. 1636—47 to 1636—57, Stats.: Supp. 1906). An examination thereof fails to disclose that they touch the subject covered by the ordinance. It is too well settled that a city may make reasonable police regulations respecting the use of its streets, not contravening the letter or spirit of any statute on the subject, to warrant discussing the subject in this case. The statutes relied on expressly reserve to municipalities the usual powers of regulation not inconsistent therewith, and require automobile drivers to observe the rules of the road. The ordinance in question seems to be in perfect harmony therewith.

Objection is made because language was used in the instructions from which the jury, as claimed, might have gotten the idea that the presence of the obstruction at the corner was no justification for appellant turning to the left instead of waiting for opportunity to proceed near the right-hand curb according to the terms of the ordinance, though, it is confessed, that the court did not, probably, intend to do so, but rather to leave room for the jury to find that a person circumstanced as appellant was, may use his judgment as to whether it is possible, within the meaning of the ordinance, to proceed near the curb, and if not, to reach his destination some other way, and, perhaps, by going to the left as appellant did. It is a sufficient answer to counsel's contention to say that, in our judgment, the ordinance means just what it is suggested the trial court inadvertently and prejudicially gave the jury to understand. The purpose was to compel persons with vehicles to proceed along the street in such order as to minimize the danger of accidents, and that in case of there being obstructions, as in this case, to wait for a clearance. We see nothing unreasonable in that. It must be assumed that the people who stood between the cars and the curb knew appellant had the right of passage superior to their right to stand, unneces-

sarily, in the street, and that, had he signaled to them seasonably, they would have given way for him. The mere fact, without any fault of appellant, that he had to choose between slackening speed or, even, stopping for a moment for a clearance of the way, or violating the ordinance by turning as he did, is no justification for his act. If it were left to every owner of an automobile to violate such a city regulation when otherwise he would experience some inconvenience, there would be very little use of having such an ordinance, and the difficulty, now very great, of guarding against automobiles being a serious menace to the personal safety of people while on the public ways would be intolerable.

The foregoing renders some other matters discussed by appellant's counsel immaterial.

By the Court.—The judgment is affirmed.

INTERNATIONAL TEXT BOOK COMPANY, Appellant, vs. SAMER, Respondent.

December 10, 1912—January 7, 1913.

Appeal: Review: Questions considered: Harmless errors.

1. An appeal from a judgment does not bring up for review in the supreme court orders made after judgment; hence, upon such an appeal, errors alleged in the denial of a new trial after judgment cannot be considered.
2. A judgment will not be reversed because of rulings upon evidence which, even if erroneous, clearly had no substantial effect upon the verdict rendered.

APPEAL from a judgment of the county court of Winnebago county: FRED BEGLINGER, Judge. *Affirmed.*

This is an appeal from a judgment for costs rendered against the plaintiff on the verdict of a jury.

For the appellant there were briefs by *R. L. Clark* and *David C. Harrington,* and oral argument by *Mr. Clark* and *Mr. Charles E. Hammersley.*

William N. Powers, for the respondent.

SIEBECKER, J. Plaintiff seeks to recover the balance alleged to be due under the terms of a written contract, whereby the plaintiff agreed to furnish the defendant a course of instruction in all subjects embraced in an examination under the civil service commission for clerk or carrier in the post-office branch of the United States civil service, for which the defendant agreed to pay $45 in monthly instalments of $5.

The course of instruction to be furnished the defendant was intended to prepare him to pass the civil service examination for rural mail carrier. The contract was signed and a payment of $5 made on April 24, 1906. Five weeks later another payment of $5 was made by the defendant. For about six weeks after the signing of the contract the plaintiff sent to the defendant and the defendant received pamphlets of instruction and sets of questions to be answered by the defendant. Defendant sent in several sets of answers to questions received by him.

In June, 1906, the defendant entered a business college at Oshkosh and remained there until November. During the month of November the defendant took the civil service examination, but failed to pass. In April of the succeeding year he again took the civil service examination and passed. During March, April, and May, 1907, the defendant was a student at the business college. Besides the two payments mentioned above, the defendant paid $5 on November 10, 1906, and $3 on August 23, 1907.

The answer to the complaint alleges that the contract was secured by fraud.

The plaintiff introduced evidence tending to show that the course which was to be furnished the defendant was calcu-

lated to prepare him to pass the civil service examination which he desired to take, that the defendant had made payments upon the contract after he omitted sending in answers to the questions sent him, that he made no complaint about the course until after he had passed the examination for which the course of instruction was to prepare him, but that he notified the plaintiff of a desire to change to a different course and made payments on the contract, and that defendant refused to pay the balance due on the contract only after the plaintiff had failed to recover in another action on a similar contract.

The defendant testified that he was assured that the course of instruction to be given would prepare him for passing the examination for the position he desired in the civil service, that the course was not calculated to so prepare him, that books of instruction to be furnished under the contract were not furnished, and that the questions and criticisms upon his papers were not sent to him promptly, and that the payments made by him after he had abandoned the course of instruction were forced from him by threats.

Judgment was rendered for the defendant upon the verdict of the jury in his favor. After judgment had been rendered the plaintiff moved to vacate the judgment, set aside the verdict, and to render judgment for the plaintiff, and in case of a denial of this motion that a new trial be granted. These motions were denied. The plaintiff appealed from the judgment, but not from the orders entered after judgment refusing to grant a new trial.

Under this state of the record it must be assumed that the verdict is sustained by evidence. This appeal from the judgment does not bring for review in this court the orders made after judgment, and hence the errors alleged in the denial of a new trial after judgment cannot be considered. *Kozik v. Czapiewski,* 136 Wis. 70, 116 N. W. 640.

Appellant urges upon our attention several exceptions to rulings on evidence. These we have examined, but find they

refer to matters which were of very slight significance and clearly had no substantial effect on the verdict rendered.

It is also claimed that the court erred in the instructions to the jury, in that it erroneously stated the alleged grounds of defense in the obtaining of the contract through fraudulent representations of the plaintiff. An examination of all the instructions given the jury discloses that they cover the issues fully and state correctly the rules of law applicable thereto. The withdrawal of the instruction pertaining to defendant's counterclaim, upon his suggestion that all right thereto was waived, did not render the remaining portion incorrect as to the issues submitted.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

HUTCHINSON, Appellant, vs. CITY OF OSHKOSH, Respondent.

December 10, 1912—January 7, 1913.

Municipal corporations: Claims: Filing: Verification: Tort actions: Special charter: Adoption of parts of general charter: Effect.

Prior to the adoption of secs. 925—58 to 925—60, Stats., by the city of Oshkosh, its charter required all claims against the city to be verified and filed (Laws of 1891, ch. 59, subch. IX, sec. 1), and prohibited suits on any claim or demand until the same had been filed and disallowed (subch. XXI, sec. 4); but, the words "claim or demand" being held applicable only to claims arising on contract, tort actions might be brought against the city without the filing of a claim. By secs. 925—58 to 925—60, claims of all kinds, whether on contract or otherwise, were required to be filed, and suits thereon were prohibited until after filing and disallowance. *Held*, that the adoption of those sections by the city did not supersede or repeal sec. 1, subch. IX, of the charter, and that thereafter the requirement that claims should be verified applied to claims founded on tort as well as those on contract.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *John W. Hume* and *John F. Kluwin,* and oral argument by *Mr. Kluwin.* They contended, *inter alia,* that prior to the adoption of the general charter provisions the special charter did not require the filing or verification of claims founded on tort. *Bradley v. Eau Claire,* 56 Wis. 168, 14 N. W. 10; *Kelley v. Madison,* 43 Wis. 638; *Jung v. Stevens Point,* 74 Wis. 547, 43 N. W. 513; *Sommers v. Marshfield,* 90 Wis. 59, 62 N. W. 937; *Hill v. Fond du Lac,* 56 Wis. 242, 14 N. W. 25. Nothing in the sections of the general charter adopted by the city, or in any other part of the general charter, requires verification of tort claims. Hence, sec. 1, subch. IX, of the special charter cannot now be held to have a new meaning and to require such claims to be verified.

R. A. Hollister, corporation counsel, for the respondent.

KERWIN, J. The appellant filed an unverified claim in a tort action with the city clerk of respondent city, and, the city having failed to act upon it within sixty days, the appellant regarded it disallowed by nonaction and appealed to the circuit court. The action was there dismissed for want of jurisdiction, and from the order of dismissal this appeal was taken.

The correctness of the order below turns upon the charter provisions. The record shows that the appellant complied with the provisions of sec. 1339, Stats., and acts amendatory thereof and supplementary thereto.

It is without dispute that in 1902 the city of *Oshkosh* adopted secs. 925—58 to 925—60, inclusive, Stats., as amended. Prior to that time the charter provisions covering the subject were sec. 1, subch. IX, and secs. 4, 5, and 6 of subch. XXI, being parts of ch. 59, Laws of 1891 (vol. 2).

Sec. 1, subch. IX, provides: "All claims and demands against the city except for salaries shall be itemized, verified by oath of the claimant or some one in his behalf, and filed with the city clerk, who shall indorse thereon the name of

claimant, amount and nature of claim, date of filing and proper number of claim, and within one week deliver the same to the comptroller for examination, who shall examine such claims presented against the city and so delivered to him, whether founded on contract or otherwise, and determine as to each claim whether the same is properly itemized and sworn to, or if on contract, whether the items charged are correct, whether such claim was incurred by proper authority, and generally determine the correctness of such claim. For the above purposes he shall have power to swear witnesses and take testimony. If he does not find any objection to the claim, he shall mark his approval thereon; if he disapproves, or approves in part and disapproves in part, he shall report his reasons therefor, and in all cases he shall report the evidence taken by him. No claim shall be considered by the council or reported to a committee till it shall have been examined and reported on by the comptroller. The comptroller shall so examine said claims and demands and return the same to the city clerk within two weeks after he shall have received them with his report thereon in writing. The city clerk shall thereupon place such claims or demands before the proper board or common council, as shown by the nature of the claim, at the next meeting of such board or common council for allowance; if a claim arising on account of the public parks, before the board of public parks; if a claim arising on account of the schools, other than the erection and repair of school buildings and maintenance of school grounds, before the board of education; and all other claims before the common council."

Sec. 4, subch. XXI, provides: "No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof."

Sec. 5, subch. XXI, provides: "The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal be taken from the decision of such common council as in this act provided."

Sec. 6, subch. XXI, provides for appeal to circuit court on disallowance of claim.

Counsel for appellant do not seem to agree in their contentions for reversal. If we understand them correctly, one insists that the adoption of secs. 925—58 to 925—60 supersedes or repeals subch. IX of the charter, while the other contends that the proper construction of subch. IX of the city charter is that tort claims are not required to be verified. We cannot agree with either contention.

Prior to the adoption of secs. 925—58 to 925—60 as amended, the charter, sec. 1, subch. IX, required all claims to be verified, and during the same time subch. XXI prohibited suits on claims or demands. But since this court held that claims or demands did not include tort actions the prohibition did not reach them, and therefore suits might be brought against the city in the ordinary way on tort actions without filing a claim, while claims on contract should be filed with the council and suit upon them otherwise prohibited.

In adopting secs. 925—58 to 925—60 as amended, all suits were prohibited on all claims, whether on contract or otherwise. So after the adoption of this statute, tort as well as other claims were required to be filed, and by the terms of subch. IX were required to be verified.

There is no room for the contention that subch. IX of the charter was either superseded or repealed by the adoption of secs. 925—58 to 925—60, nor that subch. IX only required claims on contract to be verified. The fact that tort actions might be brought directly against the city without verifying or filing before the change, by no means obviates the necessity of verifying after the change in the law preventing all actions against the city except by filing claims verified in the manner provided in subch. IX. The class of claims to be filed was by the adoption of secs. 925—58 to 925—60 enlarged, since by filing only could they be brought into court, suit upon them as formerly being prohibited.

Subch. IX and subch. XXI of the city charter were separate and distinct and served different purposes before the change in the charter. Subch. IX and secs. 925—58 to 925—60, which took the place in modified form of subch. XXI, serve distinct purposes and can well subsist together, and there is nothing to show any intention to repeal subch. IX by the adoption of secs. 925—58 to 925—60.

It follows, therefore, that it was necessary to comply with subch. IX by verifying the claim as therein required. The claim, not having been verified, was not a proper claim for consideration and the council was justified in disregarding it. No proper claim having been filed, the court below had no jurisdiction, and the order of dismissal was right and must be affirmed.

By the Court.—The order is affirmed.

VADER and another, Respondents, vs. BALLOU, Appellant.

December 11, 1912—January 7, 1913.

Voluntary associations: Individual liability: Credit, to whom given: Evidence.

1. Every member of a voluntary association is liable jointly and severally for the debts thereof incurred during his membership for the purpose of carrying out the objects for which the association was formed.
2. In an action to recover a balance due for printing done for a voluntary campaign committee, brought against a member who had acted as treasurer of the committee and had made part payment out of the funds contributed thereto, the fact that in the first instance plaintiffs had charged up the account to the chairman of the committee, who ordered the printing, was not conclusive evidence that the work was done upon the credit of the chairman or relying on him individually for payment.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Silas Bullard* and *D. K. Allen,* and for the respondents on that of *Williams & Williams.*

TIMLIN, J. In this action at law upon contract to recover for work and labor performed and materials furnished in printing letter-heads and circulars for distribution to the electors in the effort to have Mr. S. A. Cook nominated for United States senator at the primary election for the year 1910, the jury returned a verdict finding that the plaintiffs did the work and furnished the materials upon the credit of, and relying for payment upon, a committee of which the defendant was one. That in ordering this printing and material one Cowling acted as agent of said committee, and that the printing was done and materials furnished with the knowledge and consent of the defendant, *Ballou,* who ratified the acts of Cowling in regard to the same.

The errors assigned go to the sufficiency of the evidence to support this verdict and to the sufficiency of the verdict to support a judgment for the plaintiff.

It appeared that the work and material in question were ordered by Mr. Cowling, delivered to him, and charged to him upon respondents' books of account. After the work was begun Mr. Cowling informed respondents that there was a committee to which matters of payment must be referred. It also appeared that Mr. Cowling was chairman of a voluntary campaign committee having charge of the active details of the campaign, and that *Mr. Ballou,* the appellant, was also a member of and the treasurer of that committee. The work done and materials furnished were appropriate to the purpose for which the voluntary organization was formed. There is evidence tending to show that *Mr. Ballou* knew of the contract with respondents and made part payment thereon out of the funds contributed to the committee. The verdict found that the plaintiffs did not do the printing and furnish the material

upon the credit of or relying upon W. C. Cowling individually for payment. Upon the findings of fact by the jury, which we think are supported by evidence, the members of this committee would be liable to the plaintiffs for the demand in question. The fact that the plaintiffs charged up the account in the first instance against Mr. Cowling, while an item of evidence, was not conclusive, and is disposed of by the finding of the jury above stated. *Champion v. Doty,* 31 Wis. 190. The members of the committee, including the defendant, *Ballou,* had knowledge that this work was being done and this material furnished, that it must be paid for, that it was adapted to the purpose for which they had organized themselves into a committee, and that it was a disbursement necessary to their effectual work. The only question is whether the plaintiffs could select one member of this committee and hold him liable for the whole amount. In other words, whether the liability is joint and several. It may be that even this question is not presented because it was not raised by answer. *Derickson v. Whitney,* 6 Gray, 248. But the liability of the members of the committee is joint and several. *Fredendall v. Taylor,* 23 Wis. 538; *S. C.* 26 Wis. 286. Each member of a voluntary association is liable for the debts thereof if incurred during his period of membership and contracted for the purpose of carrying out the objects for which the association was formed. *Sheehy v. Blake,* 72 Wis. 411, 39 N. W. 479; 4 Cyc. 311.

By the Court.—Judgment affirmed.

MOREHOUSE, Appellant, vs. VOIGHT, Respondent.

December 11, 1912—January 7, 1913.

Trial: Admissions in court: Evidence to the contrary: Appeal: Errors cured by instructions: Pleading: Amendment to conform to proof: Contracts: Work and labor: Evidence: Intention as to payment: Land contract: Possession: Parol evidence affecting writing.

1. In an action for goods delivered and services rendered, the defendant, in opposing a motion for reference, stated in open court that he would not on the trial dispute certain items or the value thereof as claimed; but afterwards, on the trial, he testified without objection that he had not received some of such items and that others were not worth the amount charged therefor. On a motion to strike out this testimony the court stated that it would cover the matter in the charge, and thereafter instructed the jury that defendant was bound by his first statement and that it was a verity in the case that the items referred to were furnished and were of the value claimed. *Held*, that there was no error prejudicial to plaintiff.
2. Although no answer was interposed to a second cause of action stated in the complaint, yet the plaintiff's right to recover thereon having been litigated on the trial by both parties as if an issue had been joined, the case will be treated on appeal as though the answer had been amended accordingly.
3. The error, if any, in permitting defendant to testify that he had received the labor and materials for the value of which plaintiff sued without having any intention to pay therefor, became harmless when the court instructed the jury that the intention of defendant was wholly immaterial unless they also found that plaintiff did the work and furnished the materials without any intention on his part of making any charge or receiving any pay therefor.
4. Where plaintiff had made a contract in writing to sell a farm and certain personal property thereon to defendant, by the terms of which plaintiff had a right to retain possession until the deal was finally consummated, the testimony of defendant that after the contract was made the plaintiff told him that he might go upon the farm and look after the property and take possession of a part of it, was not incompetent on the ground that it tended to vary the terms of the writing.

APPEAL from a judgment of the county court of Winnebago county: FRED BEGLINGER, Judge. *Affirmed.*

On June 21, 1911, the plaintiff and defendant entered into

a contract by the terms of which the plaintiff agreed to sell to the defendant a farm in Winnebago county and also certain described personal property located on such farm. In part payment for the aforesaid property the defendant agreed to convey to the plaintiff a house and lot which he owned in the city of Oshkosh. The contract provided that proper conveyances were to be executed within ten days and that the respective properties were to be delivered within sixty days after the conveyances were made. The necessary conveyances were executed and the terms of the contract complied with by both parties on June 29th, except that plaintiff represented in the contract that he had eighteen acres of oats planted, whereas he had only twelve, and also represented that he had twelve acres of corn planted, whereas he had but nine. When the deeds were delivered an allowance was made to the defendant on account of the shortage in oats.

Within a day or two after the contract was made the defendant moved out on the farm to look after the crops thereon, and he claims he did so by virtue of an agreement with the plaintiff that he might do so. Defendant further claimed that plaintiff turned over to him all of the personal property included in the sale, with the exception of eight cows. Until the papers were exchanged and full possession delivered, the plaintiff sold the milk from these cows to a creamery. During the interim between June 21st, when the contract was made, and June 29th, when the deeds and conveyances were delivered, the defendant used the horses and some other personal property on the farm which he agreed to purchase and which he actually did purchase. On or about July 13th plaintiff delivered possession of all of the property sold by him, as far as he could.

Shortly after the plaintiff removed from the farm he rendered a bill to the defendant for the following items, amounting in the aggregate to $47.50:

To 20 bushels oats, ground and whole.....	$8 00
To use of disc harrow, seeder, and plow, 7 days at 50 cents	3 50

To care of two calves for 17 days	$3 50
To use of team 7 days at $2	14 00
To feeding and care of horse and hogs, 4 days	4 00
To drayage from Oshkosh	2 00
To 1½ days planting corn	3 00
To lodging 4 nights	1 00
To taking care of sick cow, medicine, etc	2 00
To 750 pounds skim milk	1 50
To caring for and feeding cat and dog, 21 days	2 50
To 1 bushel seed corn	1 50
To 20 quarts of milk at 5 cents	1 00
	$47 50

The defendant refused to pay the same and this action was brought to recover the amount thereof.

As a second cause of action the plaintiff alleged that the defendant unlawfully took and converted to his own use one loading plank, one hayrack, and two saw-horses, of the value of $9.50, for which sum judgment was demanded.

For answer to the first cause of action defendant denied that the plaintiff had delivered the goods, wares, or merchandise or had rendered the services for which suit was brought, and further set forth that the parties mutually agreed that the defendant might go into possession of all the personal property which he had agreed to purchase from the plaintiff immediately after the contract of June 21st was entered into, and that pursuant to such agreement he did take possession of the property, and that he was in no manner liable to the plaintiff for the use of the same. No answer was interposed to the second cause of action. The defendant by way of a counterclaim alleged that the plaintiff had agreed to convey to the defendant twelve acres of "corn in crop;" that he had delivered but eight and one-tenth acres, in consequence of which breach of contract the defendant had suffered damages in the sum of $50.65.

On the trial testimony was offered by both parties relative to the second cause of action, the defendant denying and the plaintiff asserting conversion of the articles heretofore mentioned. Such evidence was offered without any objection. Before the trial the plaintiff moved for an order of reference,

which motion was denied for the reason, as recited in the order, that defendant's counsel stated in open court "that he will not dispute the specific items of plaintiff's first cause of action or the value thereof." The case was submitted to the jury on a general verdict. No allowance was made to the plaintiff on either cause of action and the defendant was awarded $12 on his counterclaim. From a judgment entered on this verdict the plaintiff appeals.

The cause was submitted for the appellant on the briefs of *B. E. Van Keuren,* and for the respondent on that of *Earl P. Finch.*

BARNES, J. As a stickler for principle, one Samuel Pickwick, Esq., "had nothing" on the parties to this action. The labor and materials covered by the first cause of action were rendered and furnished under such circumstances that a jury might well find that there was no expectation on the part of the plaintiff to receive pay therefor, and that the necessary facts did not exist to create an implied promise to pay. This part of the case was fairly submitted by the court to the jury and no particular complaint is made about the manner of submission. Fifteen errors are assigned and argued. In a trifling case like the one before us, involving but a few simple issues, it approaches the absurd to claim that the trial court committed such an array of prejudicial errors. It could hardly do so unless it was attempting to make or break a record. We shall discuss only such of the errors assigned as we think merit some consideration.

The plaintiff moved for a reference. In opposing such motion defendant's counsel stated in open court that he would not deny on the trial that the plaintiff furnished the items covered by the first cause of action or that they were of the value claimed. On the trial the defendant without objection offered proof to the effect that he had not received a number of the items charged for, and, as to others, that they were not

worth the amount charged therefor. The plaintiff then moved to strike this testimony out. The court stated that it would cover the matter in the charge, which it did by instructing the jury in effect that the defendant was bound by the statement referred to and that it must be taken as a verity that the articles charged for were furnished and were of the value claimed by the plaintiff. This was, in effect, a ruling favorable to the plaintiff on his motion, and we fail to see where he has any cause for complaint.

The complaint contained a second cause of action for the recovery of the value of the property alleged to have been wrongfully converted by the defendant, of the value of $9.50. No answer was interposed to this cause of action. The plaintiff offered evidence on the trial in support of the allegations of the complaint, and the defendant without objection offered evidence to the contrary. The issue was submitted to the jury and decided adversely to the plaintiff. The latter now insists that he was entitled to judgment on the pleadings for the amount claimed on this cause of action, and that it was error to submit any issue in reference thereto to the jury.

The right of the plaintiff to recover on this cause of action was litigated on the trial in the same manner and apparently to the same extent that it would have been litigated had issue been joined. Both parties acted on the assumption that an issue was raised in reference to the cause of action. It was apparently litigated on this theory. This being so, this court will treat the case as though the answer had been amended so as to put in issue the allegations of the complaint. Such has been the practice of this court for a long time. *Bowman v. Van Kuren,* 29 Wis. 209; *Killman v. Gregory,* 91 Wis. 478, 65 N. W. 53; *My Laundry Co. v. Schmeling,* 129 Wis. 597, 614, 109 N. W. 540.

The defendant was permitted, against objection, to testify that he received the labor and material charged for in the first cause of action without having any intention to pay therefor.

It is insisted that the court erred in receiving this testimony. The court instructed the jury that any intention the defendant might have had not to pay for the items charged was wholly immaterial, unless it also found that the plaintiff did the work and furnished the materials without any intention on his part of making any charge or receiving any pay therefor. If it be conceded that the testimony was objectionable, a point which we do not decide, the alleged error was rendered harmless by the instruction referred to.

The parties to the suit made their preliminary agreement in reference to the sale of real estate and personal property on June 21st. Under it plaintiff had the right to retain possession of the farm and the personal property until the deal was finally consummated. The defendant was permitted to testify that the plaintiff informed him after the contract was made that he might go upon the farm and look after the property he was about to purchase and take possession of all of it except the cows. The appellant insists that it was error to admit this evidence because it tended to vary the terms of the written contract. Of course it did nothing of the kind, and if it did the objection would not be well taken. The plaintiff might waive his rights under the contract, and, as an accommodation either to himself or to the defendant, permit the defendant to take possession of the property which he was about to purchase a few days before the trade was completed, and the defendant might show that fact, if it became material to do so, in a lawsuit subsequently arising between them. The plaintiff could not invite the defendant onto the farm and put him in possession of it and of various articles thereon and afterwards insist that he had no right to such possession.

While there are a number of other errors assigned, we deem it unnecessary to discuss them. We fail to find any error in the record that would warrant a reversal.

By the Court.—Judgment affirmed.

MOYER, Special Administratrix, Respondent, vs. CITY OF OSHKOSH, Appellant.

December 11, 1912—January 7, 1913.

Municipal corporations: Claims: Presentation: Form and construction: "Legal representatives:" "Heirs:" Death from negligence: Open drawbridge: Lights and danger signals: Traveler on bicycle: Contributory negligence: Evidence: Questions for jury: Special verdict: Consistency: Limit of recovery for death: Statutes: Misleading title.

1. Under secs. 925—58 to 925—60, Stats., claims for personal injury or death must be presented to the city council, and only by such presentation and an appeal as therein provided can the circuit court acquire jurisdiction.
2. A recovery under secs. 4255, 4256, Stats., for the death of a person is not on behalf of his estate but for the benefit of the surviving widow, if there be one; and it is only in a case where there is a substantial period of suffering between the injury and the death that both causes of action may co-exist.
3. No great amount of formality is required in claims presented to a municipal corporation, and a construction which will preserve a *bona fide* claim is to be preferred to one which will have the effect to cut it off without trial.
4. Thus, a claim presented by a widow as special administratrix of the estate of her deceased husband, for damages sustained on account of his death by "the estate and his legal representatives and heirs," which shows upon its face that death ensued instantaneously, should not be limited, by a narrow and technical construction of the terms "legal representatives" and "heirs," to a mere claim in favor of the estate, but those words should be construed in a popular sense and as including the widow; and so construed it constitutes a claim under secs. 4255, 4256, Stats., in favor of the widow as beneficiary.
5. Evidence showing, among other things, that there was no warning light or danger signal in the usual and ordinary line of vision when deceased rode on his bicycle into the open draw of a bridge; that the night was dark, with snow, sleet, and a high wind; that the bridge was insufficiently lighted; and that to the knowledge of the deceased there was a system of gongs which were supposed to ring when the draw was open, but that they failed to operate at the time of the accident, is *held* sufficient to sustain a finding by the jury that the deceased

was not guilty of contributory negligence. *Stephani v. Manitowoc*, 101 Wis. 59, distinguished.

6. The fact that travelers on foot who heard the warning bell rung before the bridge opened, and who were on the lookout for it, testified that they could see the open draw, did not require the court to reject the jury's finding to the effect that the conditions were such that an ordinarily careful traveler approaching the draw might not see that it was open in time to save himself.

7. One who, from past experience, has reason to believe that a continuous alarm is sounded at a bridge while it is open, may well be excused for approaching such bridge in the darkness with greater confidence than one who knows there is no such alarm.

8. The fact that the trial judge struck out one finding in the special verdict, to the effect that the deceased, if he had looked, could not have seen, before he reached the draw, that it was open, was not inconsistent with his leaving undisturbed another finding, in substance that the bridge was so poorly lighted that an ordinarily prudent traveler, under the circumstances surrounding the deceased at the time, might approach the draw without seeing that it was open until too late to save himself.

9. In an action for death under secs. 4255, 4256, Stats., although such death resulted proximately from the negligence of a town or city as to keeping a highway in repair, the recovery is not limited to $5,000, notwithstanding that is the limit of recovery under sec. 1339 for injuries caused by defective highways.

10. The amendment of sec. 4256 by ch. 581, Laws of 1907, whereby the limit of recovery in actions for death was changed from $5,000 to $10,000, is not applicable only to actions against railway companies, although entitled "An act to amend section 4256 of the statutes relating to the liability of railway companies for the death of any person."

11. The law of 1907 being a general, not a private or local, law, the fact that its title is misleading and erroneous does not affect its validity.

VINJE, J., dissents.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover damages on account of the death of George B. Moyer, the plaintiff's intestate, a man about forty-five years of age, who attempted to cross Main

street bridge in the city of *Oshkosh* at about 6:30 o'clock on the evening of November 15, 1909, and was precipitated into Fox river through the open draw and drowned. He left surviving him his widow (the plaintiff) and several minor children. Moyer was riding a bicycle and was approaching the bridge from the south. He passed over the approach, 125 feet in length, and apparently did not see that the draw was open until it was too late to save himself. There was evidence that the evening was stormy. A number of witnesses testified that it was raining and snowing. Others denied that there was rain or snow at the time, but all agreed that it was dark, cloudy, and windy. The intestate was drowned before help reached him, his body was recovered on the following day, and the right leg found to be broken in two places. The negligence charged against the city consisted of the failure to give proper signals or warnings to show that the draw was open and the failure to provide proper guards and lights.

The following notice and demand was served on the city November 29, 1909:

"*To the City of Oshkosh, the Mayor and Common Council thereof.*

"*To Daniel Witzel, City Clerk of the said City of Oshkosh, Wisconsin:*

"I, *Lena Moyer,* special administratrix of the estate of George B. Moyer, deceased, do hereby make claim against the city of *Oshkosh,* Wisconsin, in the sum of ten thousand ($10,000) dollars, for damages sustained to the estate of George B. Moyer, his legal representatives and heirs, under the following circumstances:

"On the 15th day of November, A. D. 1909, about 6:30 in the evening, at the city of *Oshkosh,* Wisconsin, while said George B. Moyer was riding a bicycle on the bridge spanning the Fox river, connecting Main street with South Main street in the city of *Oshkosh,* said bridge at said time having no gates or barriers to prevent persons walking, riding or driving over said bridge from going into the waters of said Fox river when said draw was open for the passage of boats,

and no proper signals being sounded or warning given to persons walking, riding or going over said bridge at said time; and said bridge at said time being improperly lighted while the said George B. Moyer was riding his bicycle, going north on said bridge from South Main street to Main street on the north side of the river, said draw at said time being open for the passage of a steamboat; the said George B. Moyer was precipitated into the waters of said Fox river; and then and there drowned without any negligence on his part whatsoever. And said estate and the legal representatives thereof, claim the sum of ten thousand ($10,000) dollars damages.

"LENA MOYER,
"Special Administratrix of the
Estate of George B. Moyer, deceased."

The claim having been disallowed by nonaction of the city council, an appeal was taken to the circuit court for Winnebago county, where formal pleadings were filed and the action tried before a jury, which returned the following special verdict:

"(1) Did the said George B. Moyer ride off said Main street bridge on a bicycle and meet his death by drowning at the time and place alleged in the complaint? *A.* (by the court). Yes.

"(2) Did the lighting system used on the said Main street bridge at the time in question and long previous thereto render the bridge insufficient and unsafe for persons traveling over the same on vehicles, in the exercise of ordinary care and prudence? *A.* Yes.

"(3) At the time and place complained of, did the absence of the guard or gate at the end of the approach next to the drawbridge make travel over and along the roadway of said bridge on vehicles, unsafe or dangerous to persons using ordinary care and prudence? *A.* Yes.

"(4) Was the system of gongs and bells in use on said bridge at the time and place complained of, and for many months previous thereto, so defective and insufficient as to make the bridge as to persons traveling over and along the roadway thereon on vehicles unsafe and dangerous to travelers thereon using ordinary care and prudence? *A.* Yes.

"(5) If you answer question 2 or 3 'Yes,' then was the fact therein found the proximate cause of the death of said George B. Moyer? *A.* Yes.

"(6) Did any want of ordinary care and prudence on the part of said George B. Moyer at the time and place in question contribute to produce his death? *A.* No.

"(7) Was the said bridge at the time said Moyer was drowned lighted so as to enable a traveler on the roadway thereof, approaching the open draw, in exercise of ordinary care and prudence, to see that the draw was open before he reached the draw? *A.* No.

"(8) Were the cluster lights on the south span of the bridge burning at the time said Moyer fell into the river? *A.* Yes.

"(9) On the night in question, at the time said Moyer was upon this bridge and before he reached the draw, could he have seen that the draw was open if he had looked? *A.* No.

"(10) If the plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $7,000."

Upon motion the court struck out the answer to the ninth question, left the question unanswered, and ordered judgment for the plaintiff upon the verdict, from which judgment the defendant appeals.

R. A. Hollister, corporation counsel, and *H. I. Weed,* of counsel, for the appellant.

For the respondent there was a brief by *Hume & Oellerich,* attorneys, and *Thompson, Thompson & Jackson,* of counsel, and oral argument by *J. C. Thompson* and *Carl Jackson.*

WINSLOW, C. J. Three serious contentions are made by the appellant in this case: *First,* that no claim was ever filed with the city council as required by law; *second,* that the plaintiff's intestate was guilty of contributory negligence as matter of law; and *third,* that the recovery in no event can exceed $5,000. These contentions will be taken up in their order.

1. It appears that in 1902 the city of *Oshkosh* adopted

secs. 925—58, 925—59, and 925—60 of the Statutes of 1898 (being a part of the general city charter law) as a part of its special charter. These sections prohibit the bringing of any action in the ordinary manner on any claim of any kind against the city, and require that the claimant must first present his claim or demand to the city council, and, if the claim be disallowed, appeal from the council's action thereon to the circuit court. In no other way can the plaintiff get into court. These provisions are mandatory. Only by compliance with them can the circuit court obtain jurisdiction of the subject matter. *Oshkosh W. W. Co. v. Oshkosh,* 106 Wis. 83, 81 N. W. 1040.

The only claim presented to the council in the present case was a claim by the plaintiff, as special administratrix, for "damages sustained to the estate of George B. Moyer, his legal representatives and heirs." The recovery in the present action is a recovery under secs. 4255 and 4256, Stats., for the benefit of the widow of George B. Moyer on account of the latter's death, and is not a recovery on behalf of the estate of George B. Moyer for injuries, suffering, medical expenses, or loss of time suffered by Moyer himself. In a case where there is any substantial period of suffering between the injury and the death, both causes of action may co-exist and be joined in the same complaint (*Nemecek v. Filer & S. Co.* 126 Wis. 71, 105 N. W. 225); but where the death is instantaneous, or practically so, there is no cause of action in favor of the estate as a beneficiary. *Johnson v. Eau Claire,* 149 Wis. 194, 135 N. W. 481.

In the present case not only the claim which was filed but the formal complaint in the action and the evidence showed that the death of Moyer was to all intents and purposes instantaneous. The claim states that he was precipitated into the river and was "then and there drowned." By the evidence it appears that he was not seen even to rise to the surface of the water after his fall.

The defendant's contention in brief is that the claim presented to the council is plainly a claim for damages accruing to the estate and not a claim for damages accruing to the widow under secs. 4255 and 4256, hence that there could be no recovery for the benefit of the widow because of the lack of any claim on her behalf, and no recovery for the benefit of the estate because of the practically instantaneous nature of the death.

It must be at once admitted that the claim is not happily worded. At the outset it states that the special administratrix demands of the city $10,000 for "damages sustained to the estate of George B. Moyer, his legal representatives and heirs." It then proceeds to state the facts on which the claim is based, from which it appears that death was practically instantaneous, and hence that there could be no claim in favor of the estate, and closes with the statement, "and said estate and the legal representatives thereof claim the sum of ten thousand dollars damages." The ambiguity and inaccuracy of the statement are quite apparent. It is plain that there is no claim here, technically speaking, in favor of the estate nor in favor of the heirs, and it also seems plain that the words "legal representatives" are not used with legal accuracy. These words when used in their strictly technical sense mean executors or administrators. In the present case there is, in this strictly technical sense, but one legal representative, and yet the claim is for damages suffered by the "legal representatives."

The books are full of cases where these words have been given other and broader meanings. The rule seems to be that they will ordinarily be given their accurate primary meaning where nothing appears to indicate a different intention; but that this rule will readily yield, and where it appears from a survey of the context, the subject matter, and the purpose of the writing that the words were used as indicating heirs, next of kin, descendants, widow, and sometimes even assignees,

grantees, or successors in interest, the intention will be carried into effect and the words given the meaning so intended. *Griswold v. Sawyer,* 125 N. Y. 411, 26 N. E. 464; 25 Cyc. 175–178; 5 Words & Phrases, 4070–4079.

So the word "heir" means, primarily and technically, one who by reason of birth in lawful wedlock inherits real property, but the meaning of the word when used in a paper writing is always a question of intention. It is frequently used to include all the distributees of the personal estate of a deceased person and sometimes the widow of such person. 21 Cyc. 418–422; *Addison v. New England C. T. Asso.* 144 Mass. 591, 12 N. E. 407; *Hanson v. Minn. S. R. Asso.* 59 Minn. 123, 60 N. W. 1091; 4 Words & Phrases, 3241–3264. It seems very clear to our minds that, in preparing the claim before us, the scrivener did not use the words "estate," "heirs," or "personal representatives" with intent to ascribe to them their primary or technical meanings, but rather with the idea of using words which should be broad enough in their signification to include any and all persons who might have legal claims against the city on account of the death of the intestate.

A claim in favor of the widow as beneficiary under secs. 4255 and 4256, as well as a claim in favor of the estate under sec. 1339, must be prosecuted by the administratrix or personal representative, and certainly the administratrix would in both cases be competent to file the claim with the city council. It might perhaps be truthfully said that, in legal contemplation, the administratrix has been damaged to the extent of the widow's damages, because the administratrix recovers such damages as trustee for the widow. We prefer, however, to place the decision upon broader grounds.

No narrow rule of construction should be applied to the wording of the claim. A construction which preserves a *bona fide* claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off

without trial. This court has said that "no great amount of formality is required in reference to the form in which claims are presented to a municipal corporation." *Hanrahan v. Janesville,* 137 Wis. 1, 118 N. W. 194. In the same case it was said that a mere ambiguity as to the ownership of a claim filed should not be regarded as jurisdictional, and that the council in such case "might very properly refuse to act upon the claim until it was made definite and certain, or it might disallow the claim because it was indefinite or uncertain as to ownership. Such action would enable the owner to amend his claim." *Ibid.* 6.

The claim is, in effect, the initial pleading in the cause. It is not expected to be technical or lengthy. The reason of the statutory rule with reference to pleadings, namely, that they are to be liberally construed with a view to substantial justice between the parties (sec. 2668), seems to apply to a claim of this kind fully as much as to a formal pleading. We conclude that, while the claim was ambiguously worded, it was apparent on its face that the words "personal representatives and heirs" were not used in a technical sense, but in a popular sense, and should fairly be construed as including the widow, and hence that the claim for damages in favor of the widow was in fact made as required by the statute.

2. The claim that contributory negligence appeared as matter of law is the most serious contention in the case. Upon this proposition the appellant relies confidently upon the case of *Stephani v. Manitowoc,* 101 Wis. 59, 76 N. W. 1110, where under somewhat similar circumstances this court held that the plaintiff's intestate, who walked into the open draw of a swing bridge, was guilty of contributory negligence as matter of law. In that case the deceased, who was a woman in good health, forty-three years of age and well acquainted with the bridge, walked into the open draw on a dark and cloudy, but not a stormy, night, while a steam barge was passing through. There was an approach or viaduct on each side, the north ap-

proach being 120 feet in length and the south approach nearly 100 feet in length, and the swing portion of the bridge 162 feet in length. There were electric lights on each side just above the sidewalk at the beginning of the approach, and there was a lamp placed upon the middle of the swinging portion of the bridge eight feet above the floor, which cast a red light toward each approach when the bridge was open. These lights were all burning at the time of the accident. Neither the bridge nor the approaches had any superstructure above the roadway save a four-foot railing at the side and a similar railing separating the roadway from the sidewalk. The deceased in that case was a foot passenger well acquainted with the character of the bridge and the approach, and it was held that it appeared incontrovertibly that had she looked she could have seen the open draw, and hence that she was guilty of contributory negligence as matter of law. In effect the decision was that a foot passenger who enters on the approach of a swing bridge which he knows to be without guards and also knows may be open, is bound to look and listen before attempting to step in the draw, and is guilty of contributory negligence if he does not do so, and for that reason steps into the open draw.

We have no disposition to find fault with that decision, nor have we any disposition to extend its application. The present case has a number of marked differences which must in reason differentiate it from the *Stephani Case.*

The bridge in the present case is somewhat longer than in the *Stephani Case.* The draw in the present case is 185 feet in length and the approaches about 127 feet each, but these differences are not significant. The approaches in the present case had a greater number of lights than in the *Stephani Case.* There were six so-called cluster electric lights on each approach, each cluster consisting of three sixteen-candle-power incandescent lights about eighteen feet above the roadway but at the side thereof and in the superstructure of the

spans directly underneath the top main truss or chord of the superstructure. There were two of these clusters on the south span twenty-six feet south of the draw, two clusters thirty-two and one-half feet further south, and two clusters thirty-one and one-half feet still further south. In these clusters about fifteen lamps were burning at the time of the accident. There were like clusters on the north approach. There was considerable testimony, however, that these cluster lights, on account of the network of iron girders and braces running across the roadway connecting the tops of the trusses on each side, gave very unsatisfactory light, and that it was difficult in a dark night to see whether the draw was open until one approached to a place within ten or twelve feet of the draw. There was no light of any nature on the draw of the bridge when it was open in the ordinary line of vision as one approached the draw on the roadway of the south approach. There was a red light on top of the cupola or bridge house in the center of the draw more than thirty feet above the roadway; also a red light on the center pier of the draw about five feet above the water and more than six feet below the roadway of the approach; also two red lights, one on each end of the protection pier over which the draw of the bridge rests when it is open. These lights were called marine signal lights and were for the purpose of giving warning to vessels rather than to passengers over the bridge. There was no red light or warning light of any kind directly in the line of vision when the draw was open, as in the *Stephani Case*. In order to see any of the so-called marine signal lights, the passenger on the approach would be obliged to look considerably outside of his ordinary line of vision as he approached the draw.

There were no gates upon the present bridge, but it seems that prior to 1908 there were electric bells upon the old bridge (which stood where the present bridge now stands) which rang continuously when the bridge was open, and that similar bells are in use on the other bridges of the city; that after

the present bridge was built (the precise time not appearing, but probably in April, 1908) a construction company placed a new system of bells upon the bridge with the consent of the city, and it was agreed that the company should keep them in working order for a time, and if they worked successfully the city would pay for them; that these bells had not worked continuously, but that the construction company had from time to time repaired them and attempted to make them work, but that they worked intermittently and for that reason had not been accepted by the city; that they rang the last time in the afternoon of the day of the accident, but did not ring at the time of the accident. The deceased in the present case was riding a bicycle at the time of the accident, instead of walking, as in the *Stephani Case*. There is much testimony from several witnesses that it was snowing, sleeting, and raining at the time of the accident, and that the wind was high. One witness, whose credibility seems not to be impeached, says that you could hardly see your hand before you. There was no such evidence in the *Stephani Case*.

The essential differences between the two cases may be recapitulated as follows: In the present case the intestate was riding a bicycle, in that case the deceased was a pedestrian. In this case there was no danger signal in the usual and ordinary line of vision, in that case there was such signal. In this case there was to the knowledge of the deceased a system of gongs which were supposed to ring, and frequently, at least, did ring while the bridge was open, in that case there never had been any such arrangement. In this case there is sufficient testimony to support the jury's conclusion that the situation was such that an ordinarily careful traveler approaching the draw might not see that it was open in time to save himself, in that case the court was convinced that there was no evidence to support such finding. Upon this last proposition it is argued by appellant that because several truthful witnesses who were approaching the bridge on foot, some of them

at a distance of 150 feet or more, testified that they saw the draw open, the court must reject the jury's finding on this point. We cannot agree with this contention, however. It is important to observe that nearly all of these witnesses had heard the preliminary bell rung before the bridge opened and hence were looking to ascertain the fact, while it is undisputed that the deceased was in his office at the time the bell rang. It can hardly be said that because foot passengers who, having been warned of the contemplated opening of the draw, saw it open when they were carefully looking for it, the deceased, riding on a bicycle and unconscious of any warning, must be held as matter of law to have been guilty of negligence in not seeing the open draw, especially under the evidence with regard to the conditions of the weather at the time.

These differences are all entitled to weight. The man who is driving a team or operating a motor vehicle or a bicycle is in a different situation from the man who is walking. He has other responsibilities and cares than merely to put one foot before the other, and he cannot under ordinary circumstances stop instantaneously as the pedestrian can. Some personal experience with the bicycle enables the writer to affirm rather positively that when riding in the dark the eye must be quite carefully directed to the roadway ahead, that it cannot be safely allowed to wander from side to side; and further, that a certain degree of motion must be kept up, and an instant stop cannot under ordinary circumstances be successfully made. It certainly cannot be said that it is negligence *per se* to ride a bicycle at night over a drawbridge, any more than it can be said to be negligence *per se* to drive a motor vehicle at night over the same bridge. Both means of locomotion are lawful and usual, and in both cases the management of the vehicle demands some attention, while a foot passenger may devote his entire attention to the outlook ahead and can arrest his steps at a moment's warning. *Heath v.*

Stewart, 90 Wis. 418, 63 N. W. 1051; *Schliesleder v. Milwaukee E. R. & L. Co.* 147 Wis. 668, 134 N. W. 144.

Again, the presence of an electric bell system on this bridge and on the other city bridges is a circumstance possessing considerable significance when considering the quality of the conduct of the deceased at the time of the accident. Nothing much more misleading than a system of this kind which at intervals does not operate can well be imagined. It is admitted that the deceased crossed this bridge daily, but there is no evidence that he knew of the delinquencies of the electric bell system. If he did not (and we cannot presume that he did), then the fact that it was not ringing at the time of the accident has weight in determining whether the deceased was exercising ordinary care. One who, from past experience, has good reason to believe that a continuous alarm is sounded at every bridge while it is open, may well be excused for approaching a bridge in the darkness with greater confidence than one who knows there is no such alarm. *Rohde v. C. & N. W. R. Co.* 86 Wis. 309, 56 N. W. 872; *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249.

It is true that the trial judge in the present case struck out the answer to the ninth question by which the jury found that Moyer could not have seen before he reached the draw that it was open, if he had looked; but he left undisturbed the seventh finding by which the jury found that the bridge was not lighted sufficiently so as to enable an ordinarily prudent traveler at the time to see that the draw was open before he reached it. We understand this to mean that the trial judge was of opinion that the jury might properly find that the light was so poor that an ordinarily prudent traveler, under the circumstances surrounding the deceased at the time, might approach the draw without seeing that the draw was open until it was too late to save himself, but that he was also of opinion that it could not rightly be said to be a physical im-

possibility for the deceased to see the open draw before he reached it. There is no inconsistency between these two conclusions. We conclude on this branch of the case that the *Stephani Case* does not control the present case, and that there was sufficient evidence to justify the jury in the present case in finding that the deceased was not guilty of contributory negligence.

3. The recovery in the present action was $7,000, and it is claimed that no greater recovery than $5,000 can legally be had in such an action, because in actions brought to recover damages for injuries resulting from defective highways under sec. 1339, Stats., the recovery is limited to $5,000.

The difficulty with this position is that the present action is not an action brought under sec. 1339, but is an action brought for a death caused by the negligence of another under secs. 4255 and 4256. Sec. 1339 is of no materiality here save that it imposes on towns and cities the duty to keep highways in repair and hence makes it negligence to neglect that duty. When, therefore, death results proximately from the neglect of a highway, a cause of action arises against the corporation guilty of the neglect and in favor of the relatives named by the statute by virtue of the provisions of secs. 4255 and 4256. This cause of action, however, is not a cause of action given by sec. 1339, but by secs. 4255 and 4256. Under the two latter sections there may be a recovery of $10,000, and hence the recovery in the present case is clearly within the statutory limit.

The limit of recovery in this latter class of actions was changed from $5,000 to $10,000 by ch. 581, Laws of 1907, by which sec. 4256 was entirely rewritten. It is argued that this amendment may be limited to actions against railway companies alone from the fact that the act is entitled "An act to amend section 4256 of the statutes relating to the liability of railway companies for the death of any person." It is evident that the title is erroneous and misleading, but as the

law is a general, not a private or local, law, this has no effect on its validity. There are no ambiguities in the wording of the law; it is perfectly plain in terms and applies to the recovery in any case of death by actionable negligence, hence the wording of the title can have no effect.

By the Court.—Judgment affirmed.

VINJE, J. (*dissenting*). I have reached the conclusion that the evidence does not support negative answers to questions 7 and 9. Otherwise I concur with the opinion of the court.

TOSTY, Respondent, vs. MORGAN COMPANY, Appellant.

December 11, 1912—January 7, 1913.

Master and servant: Negligence: Personal injury: Proximate cause: Special verdict: Disjunctive finding: Questions to be submitted: Warning of danger: Contributory negligence: Assumption of risk: Instructions to jury.

1. A disjunctive finding in a special verdict to the effect that one or the other of two negligent acts was the proximate cause of an injury cannot be considered a finding that either one was such cause, where there was evidence from which the jury might have found that either one was and the other was not and it does not appear from the record that the entire jury agreed as to either one of the two.
2. Where the question whether defendant was guilty of a want of ordinary care in failing to warn plaintiff of a certain danger was submitted in a special verdict, it was not error to refuse to submit a separate question as to whether defendant ought to have known that plaintiff needed such warning; because defendant could not have been guilty of actionable negligence in failing to give the warning unless he knew or ought to have known that plaintiff needed it.
3. Where there is evidence which would support a finding of assumption of risk as distinguished from active contributory negligence and the submission in a special verdict of a separate

question on the subject is requested, such question should be submitted or a specific instruction should be given in connection with the general question as to contributory negligence so that the jury will understand that assumption of risk is included therein.

4. The instructions given in this case are *held* not to have informed the jury with sufficient fulness that both forms of contributory negligence were included in the general question which was submitted.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Reversed.*

This is an action to recover damages for the loss of two fingers of the plaintiff's left hand, which were cut off by a rip-saw in the defendant's mill, September 19, 1910. The plaintiff was twenty-seven years of age; an Austrian, who had been in this country three years and had been a common laborer. He was employed by the defendant August 5, 1910, and was first set at work in the glue department on a self-feeding machine called a sticker. Two weeks later he was set at work on a circular rip-saw about a foot in diameter, extending above the surface of the table two and one-eighth inches. This saw had an iron spreader behind it from which a flat iron cover extended upward and forward, completely covering the top of the saw at a distance of about two and three-quarters inches above the table. The plaintiff claims that when he was set at work at this saw he was instructed how to push small pieces of soft wood, two inches in thickness, through the saw with his hands, and was also told that the pieces could not be allowed to go across the table and drop down behind, because the pulley which operated the saw was behind the table, and hence that the pieces which had been sawed must be kept hold of and pulled back again after the sawing was completed. It appears that the plaintiff operated the saw successfully for about a month, when he was directed to rip two pieces of veneer about an eighth of an inch thick. As he was ripping the second piece his fingers were caught in the saw and cut off. The plaintiff claims that the

veneer caught on the rear teeth of the saw and jerked back, and that the machine was dangerous and defective, at least for the purpose of ripping veneers, in that the so-called guard was too far above the saw to be of any substantial use as a guard. The plaintiff also claimed negligence in failing to warn him of the dangers incident to the ripping of veneers upon such a machine.

The jury returned the following special verdict:

"(1) Was the rip-saw in defendant's mill at which plaintiff was employed when injured a reasonably safe machine for ripping thin pieces of gum-wood as it was then equipped by defendant? *A.* No.

"(2) Was the defendant guilty of a want of ordinary care and prudence in failing to warn the plaintiff as to the danger in running such thin stuff through said rip-saw? *A.* Yes.

"(3) If you answer question number 1 'No,' or question number 2 'Yes,' then was such unsafe machine, or such failure to warn plaintiff, the proximate cause of plaintiff's injury? *A.* Yes.

"(4) Was the hand rip-saw machine such as plaintiff was operating when injured in common use in the factories in the city of Oshkosh in ripping thin stuff such as plaintiff was ripping? *A.* No.

"(5) Was the rip-saw on which plaintiff was injured obviously dangerous to the ordinarily careful employer in the same line of business as the defendant? *A.* Yes.

"(6) Was the plaintiff guilty of any want of ordinary care and prudence which in any manner contributed toward his said injuries? *A.* No.

"(7) If the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $2,500."

Judgment for the plaintiff was rendered on this verdict, and the defendant appeals.

For the appellant there was a brief by *Weed & Hollister,* and oral argument by *H. I. Weed.*

For the respondent there was a brief by *Eaton & Eaton,* and oral argument by *M. H. Eaton.*

WINSLOW, C. J. It is contended that a verdict for the defendant should have been directed both because there was no evidence of negligence on its part, and because the evidence conclusively shows assumption of risk on the part of the plaintiff. Both of these contentions are overruled without comment, except to say that we consider that both questions were properly for the jury.

One of the most serious difficulties in the case arises from the form of the third question. By their answers to the first two questions the jury find the defendant negligent (1) in the use of an unsafe machine, and (2) in the failure to warn the plaintiff of his danger, and by the answer to the third question they find that one or the other of these negligent acts was the proximate cause of the plaintiff's injury.

By a long series of decisions it has been held in this court that a disjunctive finding like this cannot be considered as a finding of either fact in cases where there was evidence from which the jury might affirm one and negative the other and it cannot be said from an examination of the record that the entire jury affirmed either of the two propositions. *Spille v. Wis. B. & I. Co.* 105 Wis. 340, 81 N. W. 397; *Lowe v. Ring,* 123 Wis. 370, 101 N. W. 698; *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103.

In the present case there was sufficient evidence from which the jury might have affirmed either of the propositions involved and negatived the other. It was not a case like *Berger v. Abel & B. Co.* 141 Wis. 321, 124 N. W. 410, where there was no evidence in support of one of the alternative propositions, and it was held that the jury as sensible men must have considered and answered only that branch of the question upon which there was evidence, and hence there was no prejudicial error.

The defendant asked that a question be incorporated in the special verdict asking the jury whether the defendant ought to have known that the plaintiff needed a warning as to the

danger of using the saw for ripping veneers. The request was refused and the defendant assigns error on this ruling. We find no error here. The proposition is fully covered by the second question. The defendant could not be guilty of actionable negligence in failing to warn unless it knew or ought to have known that the plaintiff needed the warning.

The defendant requested in various forms that a separate question covering assumption of risk be submitted to the jury, but no such question was submitted, and the subject is not covered by the verdict unless it be held to be covered by the sixth ruling which acquits the plaintiff of contributory negligence. It is quite well established in this court (though perhaps not with the most exact logic) that assumption of risk is a form of contributory negligence; that if there be no request to submit the issue by a separate question it will be covered by the general question as to the presence of contributory negligence; that if there be evidence to support a finding of assumption of risk as distinguished from active contributory negligence and a request to submit a separate question on the subject be made, such question should be submitted, or that in submitting the general question of contributory negligence a specific charge should be given to the jury covering the subject and clearly informing them of the nature of this form of contributory negligence, so that the jury will understand that both forms of negligence are included in such general question. See *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633, where the authorities on the subject are collated.

In the present case we think there was evidence from which the jury might have found assumption of risk and negatived active contributory negligence, and *vice versa*. The defendant's request to submit the issue of assumption of risk by a separate question should therefore have been granted, unless the court chose to cover the subject by a sufficient instruction in connection with the general question of contributory negli-

gence. It seems very doubtful whether this was done. The court charged the jury in connection with question 6 as follows:

"This question requires you to answer whether the plaintiff himself was guilty of a want of ordinary care and prudence which contributed to his injuries. It is contended on the part of the defendant he was so guilty, and if it had not been for his carelessness his fingers could not have gotten in on that saw; on the other hand it is contended that he was not guilty of a want of ordinary care and prudence, but was exercising ordinary care and prudence at the time. That is a question for you to determine from all the evidence and answer the question either Yes or No."

It seems quite plain that this instruction only relates to active contributory negligence. In a later portion of the charge he returned to this question in the following words:

"In considering this question I am asked by the plaintiff to instruct that an employee does not assume a risk of which he has no knowledge, experience or ability to ascertain, and if you should find from the evidence that the plaintiff had no knowledge, experience or ability sufficient to ascertain the danger which caused the loss of his fingers while running this thin gum-wood through the edger as it was then equipped, then you should consider that in answering question number 6."

This instruction refers to assumption of risk and gives the jury some negative instructions with regard to it, but can hardly be said to inform the jury of the fact that two forms of contributory negligence are included in the question with that fulness that ought to mark the instruction when the specific request for a separate question has been made and denied.

It is unnecessary now to say whether we should reverse the judgment on this latter ground alone. It is sufficient to say that upon another trial the question of assumption of risk should (if either party request) be submitted to the jury,

either by separate question or by appropriate instruction under the general question as to contributory negligence.

No other errors are assigned which seem to us substantial.

By the Court.—Judgment reversed, and action remanded for a new trial.

LUTIEN and others, Appellants, vs. CITY OF KEWAUNEE and others, Respondents.

December 11, 1912—January 7, 1913.

Appeal: Law of the case: Subsequent appeals: Judgment: Conclusiveness: Scope: Municipal corporations: Annexation of territory.

1. All mere questions of law involved in a former appeal, whether thought of and argued by counsel or not, were foreclosed by the decision of that appeal.
2. A judgment is as conclusive as to minor questions which would have turned the result either way according to their determination, even though they were only inferentially presented, as it is upon the major or ultimate proposition involved.
3. In an action to declare invalid the proceeding by which a city annexed certain territory under the general charter law, a judgment dismissing the complaint was affirmed on a former appeal upon the ground that the right to attack such proceeding was barred by limitation under sec. 925—21, Stats.; but the trial court was authorized to permit the case to be opened upon motion based upon an amended complaint showing facts sufficient to avoid the bar of the statute. *Held*, that the question of the constitutionality of the law under which the city acted and of the ordinance of annexation was involved in the former appeal and, for the case at least, was set at rest by that decision.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The plaintiffs sought to obtain a judgment declaring invalid certain proceedings under the general city charter law extending the corporate limits of the city of *Kewaunee.*

Upon a trial, objection was made to any evidence under the complaint upon the ground of insufficiency. The objection was sustained and judgment of dismissal entered. On appeal the decision was affirmed. 143 Wis. 242, 126 N. W. 662, 127 N. W. 942. For a statement, in detail, of the facts upon which plaintiff relied, reference is had to the report of such appeal. The complaint disclosed that the right to question the validity of the proceedings attacked had been extinguished by expiration of the period limited therefor by the general charter law, sec. 925—21, Stats. (1898). Upon that ground the judgment was affirmed, subject to the right of the circuit court to permit the case to be opened upon motion based upon an amended complaint showing facts sufficient to avoid the bar of the statute. There was a motion for rehearing suggesting that the statute limiting the time for challenging the validity of the proceedings was unconstitutional. Various grounds for avoiding the statute were specified, and among them, that the preliminary publication required by sec. 925—19, Stats. (1898), was not given, or was improperly given. The motion was denied, it being suggested that if the publication was not made, as claimed, or if any matter of fact existed supposed by counsel for plaintiffs to be sufficient to avoid the bar of the statute, it should be made to appear by amended complaint, as indicated in the opinion and not be presented, originally, in this court as ground for a rehearing.

Thereafter an amended complaint was presented in the court below and issue as to its sufficiency was joined. It did not set forth any new facts, except that plaintiffs did not discover the town board had neglected and refused to cause the proceedings in question to be challenged as invalid within the statutory time, till after such time had expired; that they were led to believe such action would be taken; that the town officers were fraudulently induced to take the course which they did, and that within a reasonable time after knowledge

thereof came to plaintiffs' attention they caused this action to be commenced.

The demurrer was sustained.

For the appellants there was a brief by *George W. Wing* and *Cady, Strehlow & Jaseph,* and oral argument by *Samuel H. Cady.*

For the respondents the cause was submitted on the brief of *Emil Seidenglanz* and *Nash & Nash.*

MARSHALL, J. The judgment upon the former appeal foreclosed all questions as regards this case, except as to whether facts existed, rendering the statutory bar inapplicable. No question of that kind was presented on the oral argument nor do we find any such discussed in the brief of counsel for appellants. We are favored by a discussion of whether the general charter provision for extending the corporate limits of cities is valid, and of whether the ordinance closing the annexation proceedings is unconstitutional. They are purely questions of law and not within the letter or spirit of the right saved to appellants upon the former appeal.

All mere questions of law which were involved in the case before, whether thought of by counsel and argued or not, were foreclosed by the decision. A judgment is just as conclusive as to minor questions which would have turned the result either way according to their determination, as upon the major or ultimate proposition, whether more than inferentially presented or not. *Wilcox v. Bates,* 45 Wis. 138; *McDonald v. State,* 80 Wis. 407, 50 N. W. 185; *Ean v. C., M. & St. P. R. Co.* 101 Wis. 166, 76 N. W. 329; *Rupiper v. Calloway,* 105 Wis. 4, 80 N. W. 916; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918. In the latter case it was held that a determination made here upon appeal, involving the sufficiency of a complaint, is conclusive between the parties to the action on all questions covered by it. It is not necessary

that each particular minor question should be mentioned and specifically passed upon. The decision of the ultimate matter necessarily covers all, essentially, subsidiary elements so as to make the determination of the latter harmonize with the general result. It must be plain that the former decision here was wrong if the general charter law or any part thereof, vital to the annexation proceedings or the ordinance involved, is unconstitutional. Therefore, for the case at least, all such questions were set at rest by such decision.

By the Court.—Judgment affirmed.

ALBRIGHT, Respondent, vs. ALBRIGHT and another, Appellants.

December 11, 1912—January 7, 1913.

Replevin: Ownership of property on farm: Estoppel: Evidence: Sufficiency: Competency: Cross-examination of party: Harmless errors.

1. A farm and the personal property thereon were conveyed to plaintiff by his parents in 1886. In 1893, after his father's death, he reconveyed the farm, but not the personalty, to his mother, and thereafter for many years she and the plaintiff and the defendants, his two brothers, lived together as one family on the farm. During that time the personal property was gradually replaced by other property until a complete change had taken place. After the mother's death in 1911, defendants claimed to own the personal property by virtue of a transfer from her. There was no formal transfer and no evidence that they had paid anything for the property, but there was evidence that she had said she had given it to them. In replevin the above facts, together with evidence tending to show that the present property consists of the natural increase of the live stock and new stock and farm implements purchased by plaintiff with money earned by himself, are *held* to sustain a verdict for plaintiff.
2. Unless defendants paid something for the property, or changed their position to their substantial prejudice in reliance upon

their mother's apparent ownership, plaintiff was not estopped from claiming title because he had permitted his mother to deal with it as if she owned it.

3. Although the cross-examination of plaintiff in such action was somewhat narrowly restricted by exclusion of questions as to claims filed by him against his mother's estate, as to whether he knew the provisions of her will, and as to a previous action of replevin brought against his brothers, yet, it not appearing that such matters would have thrown any light upon the issues, the error, if any, was not prejudicial.

4. Evidence in such case that plaintiff had bought goods and other property for use on the farm, paying for them with his own money, was admissible as tending to throw light on the question of ownership.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an appeal from a judgment, based upon the verdict of a jury, in an action of replevin; by which judgment certain live stock and farm machinery of the value of $900 were adjudged to be plaintiff's property and the plaintiff was also adjudged to recover $200 damages for the detention of the property. The parties to the action are brothers, the plaintiff's age being forty-seven and the defendants' thirty-nine and thirty years respectively, and all are unmarried. The family lived on a forty-acre farm in 1886, when the father and mother (Fred and Fredricka Albright) deeded the farm to the plaintiff, together with all the personal property on the premises at the time, in consideration of an agreement to support both the grantors during their lives and to pay $200 in addition. The plaintiff worked the farm with occasional absences, when he worked elsewhere, up to 1892, at which time the father died. After the father's death some difficulties seem to have occurred, and in 1893 the plaintiff deeded the forty acres back to his mother, but did not convey the personal property on the farm. From 1886 up to 1910 (when the plaintiff had some difficulties with his brothers and went away) the parties lived together as a common family upon the forty acres and did the work upon the farm. The plaintiff

and the defendant *Amel* were frequently absent for months at a time working for others, in the pineries in winter and upon neighboring farms in summer, but *August,* the youngest, was at home nearly all the time even after he became an adult. The mother was regarded apparently as the head of affairs, and generally the money received from the sale of farm products was turned over to her. The plaintiff testified, however, that he always claimed to own the machinery and live stock upon the farm, that he brought his outside earnings home with him, and either invested those earnings in machinery and stock at once or turned them over to his mother as custodian to be used for such purposes in the future. Thus he claims that the machinery and live stock on the farm, though not the same now as in 1886, have always remained his. The mother purchased an additional forty acres of land in 1906 and died in February, 1911. About two years before her death she deeded the original forty acres to *Amel* and the second forty to *August, Amel* giving his mother a mortgage for $1,000 on his forty. At the time these deeds were made the scrivener asked her how it was about the personal property, and she said, "I have given the personal property to *Amel* and *August.*" No formal transfer of title to the personal property was ever made. The defendants claim title to the personal property by virtue of this transfer from their mother, the plaintiff by virtue of the deed of 1886.

For the appellants the cause was submitted on the brief of *O. H. Bruemmer.*

For the respondent there was a brief by *W. A. Cowell,* attorney, and *Kaftan & Reynolds,* of counsel, and oral argument by *John W. Reynolds.*

WINSLOW, C. J. The great difficulty in settling the title to the personal property in litigation here arises from the fact that the parties themselves doubtless had a very hazy and uncertain idea as to their own titles. For many years

they lived as a family, holding things more or less in common and evidently not drawing property lines very carefully. It is shown without dispute that the plaintiff had a sufficient conveyance of all the property on the farm in 1886, that he never made any oral or written transfer of the same to any one, that the original property has been gradually replaced by other property until a complete change has taken place. These facts are certain. The plaintiff's testimony tends to show, in addition to this, that the present property consists of the natural increase of the live stock, together with new stock and farm implements earned by his own labor or purchased with money earned by himself, and hence that he still owns the same. There is testimony tending to contradict these latter claims, but we are unable to say that the jury's conclusion has no substantial, credible evidence in its support, and hence we cannot disturb the verdict upon the facts. It is said that the evidence tended to show that the plaintiff is estopped from now claiming title to the property because he knowingly permitted his mother to deal with the property as though she owned it, and that relying on such apparent ownership the defendants purchased the same from her. The fundamental difficulty with this proposition is that there is no evidence in the case anywhere which tends to show that the defendants paid anything for the property in question when they received it from their mother. The only evidence on the subject is that she stated that she had given it to them. Unless they paid something for it, or changed their position to their substantial prejudice, relying upon their mother's apparent ownership, they cannot claim the benefit of the equitable doctrine of estoppel.

A number of detail errors are assigned, the more important of which will be noticed.

1. The plaintiff filed claims against his mother's estate in the county court of Kewaunee county, and upon the plaintiff's cross-examination in the present case the defendants were al-

lowed to prove this fact, but so far as the details of the claims were concerned were only allowed to inquire whether the charges for labor contained in the claims included labor in caring for the stock after he deeded the farm back to his mother. The witness was then allowed to state that his claim so filed included one item of $1,200 for labor and services from 1893 to 1903, and another item of $900 for labor and services from 1903 to 1910, but that no part of this labor so charged for was for taking care of the stock. Subsequently he was asked whether he had not also filed a claim for $200 for money advanced to his mother, and objection to this question was sustained. It is now claimed that the court should have allowed a full and complete cross-examination as to all items of the claim filed in the county court. The ruling seems somewhat restricted, especially in view of the fact that the party himself was under cross-examination. We think the questions might properly have been allowed; but error must be affirmatively shown, and it does not appear by inference or by statement of counsel that any of the items of the claims filed would have cast any light upon the justice of the plaintiff's claim in this action, hence the ruling cannot be considered prejudicial in any event.

2. The defendants also sought to show upon cross-examination of the plaintiff that he had brought an action of replevin against his brothers for property not involved in this action sometime previous to the bringing of this action, but an objection to the testimony was sustained. The same ruling was made when the defendants' counsel asked the plaintiff if he knew what the provisions of his mother's will were. Here again it might well be that the court in its discretion might allow the questions to be answered, especially as the witness was the party to the litigation, but, on the other hand, it does not appear that either fact would be material to the issues in the present controversy, and hence there was no error in the rulings.

3. Plaintiff was allowed against objection to show that he

purchased goods and other property for use on the farm in his own name and paid for them himself from his own money, and error is now assigned on this ruling. Probably it was not very persuasive, but in view of the difficulty of proving where the title of this property was on account of the community life which the parties had led, it seems that it tended legitimately to throw light on the question of ownership. If the plaintiff regularly bought and paid for supplies for the farm from his own money, that fact would have a legitimate tendency to show that he had and claimed the interest of a proprietor there and was not a mere employee.

There are no other contentions made which deserve special treatment. We find no prejudicial error in the case.

By the Court.—Judgment affirmed.

JOHNSON, Appellant, vs. LEWIS, Respondent.

December 11, 1912—January 7, 1913.

Animals: Killing of sheep by dogs of different owners: Liability: Special verdict: Submitting new questions in absence of counsel.

1. Under sec. 1620, Stats., if dogs of different owners unite in killing, wounding, or worrying sheep, each owner is liable for all the damage so done.
2. Where, in an action for the killing, wounding, and worrying of sheep there was evidence tending to show that the damage was done by a small dog belonging to defendant and a larger one owned by another person, and the jury, coming in with an incomplete special verdict, informed the court that they were having difficulty with the question of separating the damage done by each dog, they should have been told that that question was not before them; and it was error to submit to them a new set of questions in order to make it easier for them to separate such damage, whereby they were led and encouraged to find nonliability of defendant upon a ground inconsistent with the rule above stated.
3. Where a jury returns into court after having retired to consider a special verdict, it is error for the court to submit a new and materially different verdict in the absence of counsel.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

L. H. Bancroft, for the appellant.

For the respondent there was a brief by *Burnham & Black,* and oral argument by *C. D. Black.*

TIMLIN, J. The action is brought against the defendant as owner and keeper of a dog to recover damages for sheep and lambs of the plaintiff chased, bit, worried, and killed by said dog. Evidence sufficient to take the case to the jury was presented tending to show that two dogs, one a hound and the other a small cur weighing about twenty pounds, were harbored and kept at the farm house and premises of the defendant and that these two dogs did the mischief complained of. This farm house belonged to and was occupied by the defendant, a bachelor, and also by defendant's brother-in-law, Alleback, who by agreement with defendant was a cropper of defendant's farm on shares and had the management thereof. Defendant worked on the farm and kept up the fences. There was evidence tending to show that the hound belonged to Alleback and the other dog to the defendant.

The cause was submitted on a special verdict, the first question calling for the amount of plaintiff's damages incurred by reason of the killing and wounding of some sheep and lambs and the worrying of other sheep by the dogs on the night in question. The second and third questions were as follows: "(2) Did the two dogs kept on the defendant's farm kill, wound, and worry the sheep as stated in the first question? (3) Did the defendant keep and harbor the hound dog upon his said farm?" The instructions were very meager and no explanation given to the jury of the rule of law announced in *Nelson v. Nugent,* 106 Wis. 477, 82 N. W. 287. The jury retired at 6 o'clock p. m. and returned into court at 10 o'clock p. m. with the second question answered "No." Neither counsel was present. The following colloquy took place be-

tween the court and the jury: "By the Court. Do you mean by that answer that neither one of the dogs killed the plaintiff's sheep? Foreman. It seemed to be the general opinion that they did. Court. Do you mean by that answer that they did not kill all the sheep? Foreman. Yes; we could not separate the two dogs." The trial court then declined to receive the verdict and announced that he had written out a new set of questions that might be somewhat easier for the jury, and submitted the same with instructions that when they had answered these questions they would be permitted to separate and return to court next morning. With some further exhortation to agree on account of the costs to the county which might otherwise be incurred, the jury retired with the new verdict, which was thereafter returned into court as follows:

"(1) Did the two dogs that were kept upon defendant's farm, or either of them, kill, wound, or worry the plaintiff's sheep? *A.* Yes.

"(2) If you have answered the first question 'Yes,' answer this question: Did both of them do so or only one? *A.* One.

"(3) If you have answered the last question by writing only one, state now which one? *A.* The hound.

"(4) If you answered the first question 'Yes,' state now what was the amount of the injury in dollars so done to the plaintiff's sheep. *A.* $151.25.

"(5) Did the defendant keep and harbor the hound dog on his farm? *A.* No."

The verdict as last submitted and returned is consistent with the theory that, although both dogs may have been engaged in the chase of the sheep and lambs, the hound dog, by reason of superior strength or speed, was the dog which killed, wounded, or worried the sheep. This verdict was drawn up and submitted in the absence of counsel. There was no opportunity to object to any question thereof, or to propose other questions, or to request instructions with reference thereto.

The colloquy with the jury informed the court that the former were having difficulty with the question of separating the damage done by each dog. The jury should have been told that this question was not before them for consideration. This second verdict was written for the purpose of making a new set of questions under which it might be easier to separate the damage done by each dog. It fails to find whether the smaller dog took part with the hound in the chase of the sheep, but does find that only the hound killed, wounded, and worried the sheep. So the form of the verdict indicates. This should not have been done and the appellant was prejudiced thereby, because the jury were led and encouraged to find nonliability of the defendant upon that ground, inconsistent with the rule of law announced in *Nelson v. Nugent,* 106 Wis. 477, 82 N. W. 287. If the small dog joined in the chase with the hound and participated throughout to the best of his ability, his owner would be liable notwithstanding the hound outstripped him in pursuit, reached the quarry first, and inflicted the more deadly or distressing wounds. This important phase of the case was ignored.

It was also error for the circuit court to draw up and submit this new verdict in the absence of counsel and without an opportunity for counsel to be heard thereon or to object or except thereto. *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737. Here the prejudice to appellant is apparent, because he was deprived thereby of his right to propose questions for the new verdict, to make requests for instructions and to be heard in argument thereon, as well as his right to take exceptions to the questions submitted.

By the Court.—Judgment reversed, and the cause remanded for a new trial.

CITIZENS SAVINGS & TRUST COMPANY, Appellant, vs. SCHOOL SISTERS OF NOTRE DAME, Respondent.

December 12, 1912—January 7, 1913.

Taxation: Mortgage of exempt property: Covenant to pay taxes on "mortgage:" Tax on bonds not included.

In a mortgage (in the form of a trust deed) securing bonds, the mortgagor agreed that it would pay all taxes thereafter lawfully assessed or imposed upon the mortgaged land, "or upon this mortgage, or the lien or interest created thereby, . . . prior to any sale for taxes," and would "deliver duplicate receipts showing the payment of all taxes levied or assessments made." This agreement was evidently drawn to meet the provisions of sec. 1042*d*, Stats., which declares that a mortgage upon taxable real estate shall, for the purposes of taxation, be deemed an interest in such real estate, and shall be assessed and taxed as such interest, etc.; but the mortgaged land was in fact exempt from taxation, so that said section was inapplicable. *Held*, that the agreement did not cover a personal property tax assessed against a bondholder on account of the bonds. Such a tax was not a tax upon the "mortgage," nor upon the "lien or interest created thereby."

APPEAL from a judgment of the circuit court for Crawford county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

On April 1, 1909, the defendant negotiated a loan of $40,000 from the plaintiff. As evidence of such loan the defendant executed and delivered to the plaintiff eighty bonds with interest coupons attached, for $500 each. The first instalment of said bonds, amounting to $3,000, became due April 1, 1911, and a certain amount thereof became due annually thereafter until April 1, 1919, when the last instalment would become due. To secure the payment of such bonds the defendant executed and delivered to the plaintiff a trust deed of certain real estate owned by it and situated in Crawford county, Wisconsin. On or about April 8, 1909, the plaintiff sold $27,000 worth of said bonds to the trustees of the estate of Judson A. Roundy, who resided at Milwaukee, Wisconsin.

In the year 1910 there was assessed against said trustees $26,400 as and for personal property held by them. The amount of tax levied against said trustees on account of said personal property was $720.46. The plaintiff alleges that of said amount the sum of $442.13 was levied and assessed on account of the bonds of the defendant which it held as aforesaid. Such taxes were paid by the trustees of the Roundy estate and demand was made on the defendant for the amount of the taxes so paid. The defendant refused payment, and this action was brought to foreclose the trust deed because of such refusal.

The defendant claimed (1) that the proof failed to show that any tax was levied against the said trustees because of said bonds; (2) that if a tax was levied on account thereof, the proof does not show the amount of the tax which they were called upon to pay because of said bonds; (3) that said bonds were not taxable in Milwaukee; and (4) that the defendant was not liable for the tax thereon, assuming that they were taxable and were taxed there. The trial court sustained the defendant's last contention, and from a judgment dismissing the complaint plaintiff appeals to this court.

For the appellant there were briefs by *Nath. Pereles & Sons,* attorneys, and *Charles S. Carter,* of counsel, and oral argument by *Mr. Carter.*

For the respondent there was a brief by *Carpenter & Poss,* and oral argument by *Paul D. Carpenter.*

BARNES, J. The trust deed which this action is brought to foreclose contained the following provisions:

"The company [the mortgagor] agrees that it will annually hereafter pay and discharge all taxes and assessments which are or may be hereafter lawfully assessed or imposed upon the said property [the real estate described in said mortgage] or upon this mortgage, or the lien or interest created thereby, at the time or times when the said taxes or

assessments shall be respectively due and payable, and prior to any sale for taxes, and will at such times deliver duplicate receipts showing the payment of all taxes levied or assessments made, and will not suffer any waste thereof."

The foregoing is the only recital found in the trust deed pertaining to taxes.

When the trust deed was executed sec. 1042*d*, Stats. (Supp. 1906: Laws of 1903, ch. 378), was in force and provided:

"Whenever taxable real estate shall be subject to mortgage such mortgage for the purposes of taxation shall be deemed an interest in such real estate and shall be assessed and taxed as such interest in the assessment district in which such real estate is located, and not otherwise and may be separately assessed and taxed as hereinafter provided."

The mortgaged property was exempt from taxation by ch. 149, P. & L. Laws of 1869.

In his opinion the circuit court states that "None of the officers or attorneys of the plaintiff knew of this exemption at the time of the execution of the mortgage, and there is nothing in the testimony to indicate that those who acted for the defendant at that time had it in mind."

The appellant insists that sec. 1042*d* applies to mortgages on taxable real estate only and has no application to defendant's property which was not taxable; that under the provisions of sec. 1034, sec. 1036, as amended by sec. 1, ch. 346, Laws of 1899, and secs. 1040, 1042*i*, and 1056, Stats., the bonds which the trust mortgage was given to secure were assessable to the holders thereof in the assessment district where such bondholders resided, and that the defendant became liable for the payment of such tax under the provision of the trust deed above quoted.

The respondent contends (1) that there was failure of proof to show that any of its bonds were assessed, or, if there was proof that some of them were, there is none to show the amount of the assessment; (2) that the bonds were not taxable; and (3) that it was not liable for the tax in any event.

The trial court sustained the respondent's contention on this latter ground. If the court reached a correct conclusion the judgment must be affirmed.

It is quite apparent from the language used in the trust deed that it was drawn to meet the provisions of sec. 1042*d*, Stats., which declares a mortgage to be an interest in real estate and requires it to be assessed and taxed as such interest whenever the real estate is taxable. The language used is particularly appropriate to such a situation. It is particularly inappropriate to meet the situation presented by the record. If it was intended to require the defendant to pay such taxes as might be assessed against the bondholders wherever they resided, very inapt language was used to create the obligation. The entire clause is inconsistent with the idea that it was intended to cover a personal property tax assessed against a bondholder, and consistent with the idea that it was intended to cover a tax assessed against an interest in real estate. The taxes were required to be paid before there was any sale for taxes. There is no lien on personal property because of the tax assessed on account of it. There is no sale of personal property for taxes levied because of it, as the term "sale" is ordinarily understood when applied to tax proceedings. The provision calling for the delivery of duplicate receipts is proper enough where specific sums are levied for taxes on parcels of real estate. A lump sum is usually carried out which includes all of the personal property tax of the individual. It would be extraordinary to require the defendant to insist that the various tax collectors separate out the amounts levied for taxes on account of its bonds from the other personal property taxes assessed against the bondholders and compel the various treasurers to give duplicate receipts showing a *pro tanto* payment of the tax. Aside, however, from these makeweights, the language used will not admit of the interpretation contended for by the appellant.

Recurring to the quoted clause of the trust deed, it imposes the following duties on the mortgagor: (1) to pay all taxes and assessments lawfully imposed on the mortgaged property; (2) to pay all taxes assessed or imposed on the mortgage; and (3) to pay all taxes assessed against the lien or interest created by the mortgage.

The first obligation can refer only to general taxes or special assessments levied against the real estate covered by the mortgage. This seems too plain to admit of controversy. The third obligation just as plainly refers to an assessment against some interest in the mortgaged real estate. An assessment on bonds secured by mortgage is not an assessment on the lien or interest created by the mortgage. Such lien or interest is a lien on or interest in the property covered by the mortgage which enables the bondholder to have such property subjected to the payment of the bond.

If the plaintiff has any standing in court it must be because a tax imposed on the bondholder is a tax on the mortgage as well. The appellant contends that the bonds and mortgage were made at the same time and as part of the same transaction and are to be construed together as if they were parts of the same instrument; that one may explain or modify the other, and that the words "note and mortgage," "mortgage indebtedness," "mortgage interest," "interest created by mortgage," and "mortgage" mean one and the same thing, namely, a credit secured by mortgage. From this it is argued that the word "mortgage" as used in paragraph numbered (2), *supra,* means "personal property," and that there was a covenant on the part of the mortgagor to pay taxes on the real estate which was mortgaged to secure the loan, and on the personal property which was created by the loan as well. The sum and substance of the argument is that the word "mortgage" as used in this particular part of the trust deed is broad enough to include and does include any assess-

ment made because of the trust deed or because of the bonds which it was given to secure, or because of both, or because of the debt evidenced by the bonds and the trust deed.

We do not think that an agreement to pay taxes assessed against the collateral held as security for the payment of a note or bond comprehends and includes an agreement to pay taxes assessed against the credit itself or against the note or bond which evidences that credit, where the collateral security consists of a mortgage interest in real estate. There arose out of the transaction between these parties the debt and the corresponding obligation to pay, the bonds which evidenced such debt, and which are property, and the mortgage which was given to secure the payment of the debt. The legislature might tax the credit or the bonds or the mortgage. The imposition of a tax because of the debt or the evidence of it is not necessarily a tax on the security. This is well illustrated by sec. 1042*d*, which provides for a tax on a mortgage interest in real estate at the place where the mortgaged property is located, which the debtor may be compelled to pay by contract, and which is frequently levied in a jurisdiction which is not the domicile of the creditor. We think it is plain that the matter of obligating the defendant to pay taxes that might be assessed against the bondholders was not within the contemplation of the parties when the trust deed was executed; that the words "mortgage" and "lien or interest created thereby" were used as synonymous terms, and that it would be a strained and unwarrantable construction of the clause quoted from the trust deed to hold that the obligation to pay any taxes that might be assessed against the mortgage required the defendant to pay the personal property tax of the bondholders levied because of the bonds. The case was correctly decided by the trial court.

By the Court.—Judgment affirmed.

JENKS, County Judge, Appellant, vs. ALLEN and others, Respondents.

December 12, 1912—January 7, 1913.

Pleading: Demurrer: Want of legal capacity to sue: Objection, how taken: Waiver: Executors and administrators: Removal: Appointment of successor: Validity: Notice: Guardian ad litem *for minors: Action on bond of executor: Bringing in parties: Taxation of costs: Time limited.*

1. In an action against a removed executor and the sureties on his bond, brought in the name of the county judge for the benefit of the estate, pursuant to sec. 4015, Stats., the complaint showed that an administrator *de bonis non* to succeed the executor had been appointed on a legal holiday. Assuming that such appointment was for that reason without authority and hence that such administrator had not legal capacity to cause the action to be instituted, and treating him as the real plaintiff, such want of capacity was waived by failure of the defendants to demur to the complaint on that ground. [Whether in such action the defendants could object to the validity of the appointment of the administrator *de bonis non*, not decided.]
2. A demurrer *ore tenus* goes to the cause of action and does not reach plaintiff's want of legal capacity to sue.
3. A demurrer by way of answer is not recognized in this state.
4. The appointment of an administrator *de bonis non* under sec. 3804, Stats., to succeed a removed executor may be made without notice and without the appointment of a guardian *ad litem* for minors.
5. Although no guardian *ad litem* for minors was appointed at the time of the probate of the will and issuance of letters testamentary to the removed executor, such executor and his sureties, having become parties to and participated in the proceeding, waived the necessity for such appointment, and the proceeding is binding upon them, though it may be disaffirmed by the minors.
6. To the end that the whole litigation in this case may be speedily closed up as to all parties interested in the estate, the defendants, the removed executor and his sureties, are permitted to have the minors for whom no guardian *ad litem* was appointed made parties to the suit, and the final account of the executor restated.

7. Where the trial court orally ordered the action to be dismissed for lack of authority to sue, but the findings were not prepared or filed until some months thereafter, taxation of costs within sixty days after such filing was permitted by sec. 2894*a*, Stats. *McDonough v. M. & N. R. Co.* 69 Wis. 358, and *Milwaukee M. & B. Asso. v. Niezerowski*, 95 Wis. 129, distinguished.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

On November 12, 1893, Mary Curry died testate. January 23, 1894, *Phil Allen, Jr.,* was appointed executor and, as such, executed a bond signed by the defendants *W. A. Jones* and *John Allen* as sureties, and approved by the county judge. At the time of his appointment as executor, two minors, Susan Mary Rink and Florence Evangeline Rink, were interested in the estate, but no guardian *ad litem* was appointed for them in the probate proceeding. March 19, 1895, the executor filed his account, which was allowed and settled by the court, showing a balance due the estate of $3,915.28, $3,000 of which he was directed by the judgment of the county court to invest in interest-bearing securities and pay the annual interest thereof to certain of the heirs for specified periods, and, finally, to divide the principal as therein directed. The executor invested said sums in various ways, but there is now no balance remaining in his hands. On the 20th of January, 1910, an order was made requiring *Phil Allen, Jr.,* to render and settle his account as executor on the 22d day of February, 1910. Said order was served upon him, but he did not appear in any manner at the time of the hearing thereof, or at any other time. The defendants *John Allen* and *W. A. Jones* were not served and neither of them appeared at the hearing upon the order. On said 22d day of February, 1910, the county court made an order revoking the letters testamentary theretofore issued to said *Phil Allen, Jr.,* and appointed Jacob Rink administrator *de bonis non* with the will annexed of the estate of Mary Curry, deceased. Susan Mary Rink and Florence Evangeline Rink

were on said 22d day of February, 1910, minors, and were interested in the estate of said Mary Curry. No guardian *ad litem* or special guardian was appointed to look after their interests in the matter of the appointment of Rink as such administrator *de bonis non.* Rink filed the bond required by law, which was approved by the county judge, and letters testamentary as administrator *de bonis non* with the will annexed were thereupon issued to him. The defendants *W. A. Jones* and *John Allen* were notified of all said proceedings in the county court, but not until after the same had taken place. Rink, as such administrator, made a demand upon said defendants for the amount due the estate from *Phil Allen, Jr.,* but they refused to pay him any money whatever on account of the claims he made upon them as sureties of *Phil Allen, Jr.* This action is prosecuted in the name of the county judge by permission of the county court pursuant to sec. 4015, Stats., and Rule XXIII, County Court Rules. The trial court found as conclusions of law that the plaintiff herein had no legal capacity to bring and maintain this action, and dismissed it accordingly. From such judgment of dismissal the plaintiff appealed.

For the appellant there were briefs by *J. B. Reynolds* and *J. P. Smelker,* and oral argument by *Mr. Smelker.*

T. M. Priestley and *C. F. Osborn,* for the respondent *William A. Jones.*

VINJE, J. It is urged that this action cannot be maintained because Rink was appointed administrator on the 22d day of February, 1910, which was a legal holiday. Assuming that the court had no authority to appoint Rink as administrator on said date, such want of authority affected his legal capacity to cause the action to be instituted. The complaint alleged that the appointment of Rink as administrator was made on the 22d day of February, 1910. Sec. 2649, Stats. (1898), provides that one ground of demurrer is that plaint-

iff has not legal capacity to sue, and sec. 2653 provides that when any of the matters enumerated in sec. 2649 do not appear upon the face of the complaint the objection may be taken by answer. Here, treating Rink as the real plaintiff, or as in fact instituting the action, the ground of demurrer appeared upon the face of the complaint, and, on failure to take advantage of it by demurrer, it must be deemed to have been waived. *Moir v. Dodson,* 14 Wis. 279; *Wood v. Union Gospel C. B. Asso.* 63 Wis. 9, 22 N. W. 756; *Harrigan v. Gilchrist,* 121 Wis. 127, 247, 99 N. W. 909. Therefore, it having appeared by the complaint in this case that Rink was appointed administrator on a legal holiday, and no objection to his legal capacity to institute the action having been raised by special demurrer, the right to object thereto is waived. If want of legal capacity to sue does not appear by the complaint it may, of course, be taken advantage of by answer. Sec. 2653, Stats.

A demurrer *ore tenus* was interposed in this case, but such a demurrer goes to the cause of action and does not reach plaintiff's want of legal capacity to sue. *Murray v. McGarigle,* 69 Wis. 483, 34 N. W. 522. The objection that plaintiff has not legal capacity to sue cannot be taken by general demurrer. *State ex rel. Cornish v. Tuttle,* 53 Wis. 45, 9 N. W. 791. It can be taken only by special demurrer or answer. *Manseau v. Mueller,* 45 Wis. 430; *Vincent v. Starks,* 45 Wis. 458.

Defendants allege in their answer that plaintiff has not the legal capacity to sue because the appointment of Rink as administrator is wholly void, on the ground that the county court of Iowa county had no jurisdiction to make such appointment at the time it attempted to appoint him. This may be said to be a demurrer by way of answer, but such a pleading is not recognized in this state. *Jones v. Foster,* 67 Wis. 296, 30 N. W. 697; *Smith v. Kibling,* 97 Wis. 205, 72 N. W. 869.

A further defense to the action is that plaintiff has not the legal capacity to sue because no guardian *ad litem* was appointed to represent the interest of the minors, Susan Mary Rink and Florence Evangeline Rink, at the time of Rink's appointment as administrator *de bonis non* with the will annexed. This raises the question whether or not, upon the appointment of a successor to an executor who has been removed, it is necessary to give notice to parties interested in the estate. It has been held that probate proceedings as to minors for whom no guardian *ad litem* was appointed when letters testamentary or of administration were *first* issued, are void as to the minors; that is, they are not bound by them. As to others who appear therein the proceedings are valid. *O'Dell v. Rogers,* 44 Wis. 136; *Melms v. Pfister,* 59 Wis. 186, 18 N. W. 255; *Frame v. Plumb,* 138 Wis. 179, 118 N. W. 997, 120 N. W. 288. Sec. 3787, Stats., provides for giving notice of a hearing for the probate of a will to all parties interested, and sec. 3808, Stats., provides for giving like notice of the application for the appointment of an administrator of an intestate estate, or for letters of administration with the will annexed. Both of these sections relate to the initial application either for the allowance of the probate of a will or for the appointment of an administrator for an intestate estate. They do not prescribe what must be done in case an executor or administrator is removed and a successor appointed in his place. Sec. 3803, Stats., specifies the cases in which an executor or administrator may be removed, and sec. 3804, Stats., provides for the proceedings upon such removal. As to an executor, that section reads: "When an executor . . . shall be removed . . . the county court shall grant administration of the estate not already administered, with the will annexed." Neither this section nor any other, so far as we are aware, makes any provision for giving notice to parties interested, and there is good reason why such requirement is omitted. In a case where a will is attempted to be pro-

bated in the first instance and an executor is to be appointed, the most important questions that arise are whether or not the proposed instrument is in fact the will of the deceased, and whether or not it is so executed as to be entitled to probate. Upon these questions the parties interested are certainly entitled to be heard. After a will is admitted to probate and an executor has been appointed, and the estate is in process of settlement, there may be an absolute necessity for the immediate appointment of a successor, to one who has become disqualified, in order to preserve the estate.

Sec. 1120 of the Revised Code of Mississippi of 1871 provides:

"If any executor or administrator shall die, resign or be removed, or become incompetent, before a final settlement of the estate, letters of administration *de bonis non* shall be granted to the person entitled, under the rules heretofore laid down, and he shall proceed in the administration of the estate to final settlement."

In *Sivley v. Summers,* 57 Miss. 712, it was held that, upon the removal of an executor or upon his resignation, an administrator *de bonis non* could be appointed under the section of the statute quoted without notice to the legatees. And so in Massachusetts it has been held that upon the death of a sole executor or administrator neither the widow nor next of kin have a right to the administration *de bonis non,* but the judge of probate appoints in his discretion. *Russell v. Hoar,* 44 Mass. 187.

It appears that in *Hubbard v. C. & N. W. R. Co.* 104 Wis. 160, 80 N. W. 454, sec. 3808, Stats. (1898), was held applicable to the appointment of an administrator *de bonis non.* Whether or not that case is distinguishable from this by the fact that the first administrator had completed his administration, settled his accounts and been discharged, and the administrator *de bonis non* was the plaintiff of record instead of the county judge, need not be determined. True it is, the

court did not conceive that the appointment in that case was made under sec. 3804, for that section is not mentioned. Here, there can be no question but that the appointment of Rink was pursuant to authority conferred upon the county court by sec. 3804. And it must be held that such appointment, without notice and without the appointment of a guardian *ad litem* for the minors, was valid.

The defendants are in no position to object on the ground that no guardian *ad litem* for the minors was appointed when letters testamentary were issued to *Phil Allen, Jr.* Through their principal they became parties to that proceeding, and, by participating therein, they waived the necessity for the appointment of such guardian, and the proceeding is binding upon them, though it may be disaffirmed by the minors.

It may be a question whether the defendants are in a position to object to the validity of the appointment of Rink in an action against them as sureties on the bond of the removed executor brought in the name of the county judge for the benefit of the estate pursuant to sec. 4015, Stats. *Smith v. Peckham,* 39 Wis. 414; *Johannes v. Youngs,* 45 Wis. 445; *Barney v. Babcock's Estate,* 115 Wis. 409, 91 N. W. 982. To the end, however, that this whole litigation may be speedily and finally closed up as to all parties interested in the estate, the defendants, if they so elect, may have the minors made parties to the suit and the final account of *Phil Allen, Jr.,* restated. By so doing an adjudication can be made that will be conclusive on all parties interested.

It is claimed costs were not taxed within the sixty days required by sec. 2894*a,* Stats., which provides that "whenever a finding shall be filed or a verdict rendered the successful party shall perfect the judgment and cause it to be entered thereon within sixty days," and if he fails to do so no costs shall be taxed. It appears that on the 2d of October, 1911, the court orally ordered the action to be dismissed for lack of authority to sue. The findings, however, were not prepared

and signed by the judge until a long time later, and were not filed until March 4, 1912. On March 12, 1912, costs were taxed. It appears that February 10th the plaintiff served on the defendants an order to show cause why certain findings proposed by him should not be made the findings of the court. This order was made returnable February 14, 1912. It therefore appears that though the court orally stated the case should be dismissed at the close of the trial, October 2, 1911, yet the findings were not perfected then and were not filed till March 4, 1912. Taxation of costs within sixty days thereafter was permitted by the statute. The cases of *McDonough v. M. & N. R. Co.* 69 Wis. 358, 34 N. W. 120, and *Milwaukee M. & B. Asso. v. Niezerowski,* 95 Wis. 129, 70 N. W. 166, relied upon by plaintiff, do not apply. In the first case a nonsuit was granted, and in the second a general verdict returned. Obviously nothing remained to be done but enter judgment. Here, after the oral announcement of dismissal the judicial duty was not completed till findings were made, and the time within which costs shall be taxed is limited to sixty days after such findings are filed. No question is raised that the successful party did not prepare the proper judgment for the insertion of costs, as in *Milwaukee M. & B. Asso. v. Niezerowski, supra.*

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

RICHMOND, Respondent, vs. TAYLOR, Administrator, and another, Appellants.

December 12, 1912—January 7, 1913.

Descent and distribution: Heirship: Evidence: Illegitimates: Acknowledgment of paternity: Form and requisites: Conflict of laws: Domicile.

1. In a proceeding to determine heirship a finding by the circuit court that one M. (who was born in slavery) was not the daughter of the decedent is *held* erroneous, it appearing that for over forty years and up to the time of his death (excepting only a period of misunderstanding between them after she had come at his request to keep house for him in this state) the decedent had always spoken of and acknowledged her as his daughter, and there being other corroborative evidence, while the only doubt cast upon her paternity was the testimony of two aged women, one of them white, given forty-six years after the event, as to the date of her birth.
2. The written acknowledgment of paternity provided for in sec. 2274, Stats. (relating to the heirship of illegitimates), need not have been made for the express purpose of establishing heirship or of complying with the statute, if it does in fact meet the statutory requirements.
3. Such an acknowledgment need not be in precise, formal language, but is sufficient if it appears with reasonable clearness and certainty from the written words that the paternity of the child is acknowledged.
4. The law of the domicile of the person making the acknowledgment, and not that of the domicile of the child or mother, governs the question of legitimation.
5. Where, in a written application to the government for a pension, signed in the presence of a competent witness, the applicant declared a certain person to be his daughter, in such terms and under such circumstances as to exclude inadvertence or mistake, this was a sufficient acknowledgment of paternity under sec. 2274, Stats., to constitute such person his heir, assuming her to have been his illegitimate child. [Whether if she was not his child she would be entitled to inherit, not determined.]

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This action was begun originally in the county court of Grant county as a proceeding to determine heirship in the estate of Thomas Richmond, deceased. The administrator of the estate in his petition for the settlement thereof alleged on information and belief that the deceased left him surviving *Martha Richmond,* a daughter, his only child and sole heir at law, but that her right to the estate was denied by *Henry Richmond,* who claimed to be a brother of deceased. Upon the hearing in the county court *Henry Richmond* denied her right as heir and claimed that, as a brother of deceased, he was entitled to one half of the estate.

The county court found that *Martha Richmond* was the child and sole heir at law of the deceased and entitled to inherit the entire estate. *Henry Richmond* appealed from the judgment of the county court to the circuit court for Grant county. The last named court found that *Martha* was not the child of Thomas Richmond, and that any acknowledgment of her by him as his daughter was made by mistake as to her paternity. It further found that the deceased left him surviving as his heirs at law *Henry Richmond,* the respondent, and Peter Richmond, his brother, and wholly reversed the judgment of the county court. From such judgment of reversal the administrator and *Martha Richmond* appealed.

For the appellants there was a brief by *Brown, Brennan & Carthew,* and oral argument by *H. E. Carthew.* They argued, among other things, that the statute makes the written acknowledgment the only permissible proof of paternity; and that it may consist of any collateral writing and need not be made for the purpose of legitimation. *In re Rohrer,* 22 Wash. 151, 60 Pac. 122; *In re Gorkow's Estate,* 20 Wash. 563, 56 Pac. 385; *Blythe v. Ayres,* 96 Cal. 532, 31 Pac. 915; *In re Jessup's Estate,* 81 Cal. 408, 22 Pac. 743; *Binns v. Dazey,* 147 Ind. 536, 44 N. E. 644; *In re Pederson's Estate,* 97 Minn. 491, 106 N. W. 958; *Crane v. Crane,* 31 Iowa, 296; *Lind v. Burke,* 56 Neb. 785, 77 N. W. 444; *Brown v. Iowa*

Legion of Honor, 107 Iowa, 439, 78 N. W. 73; *Thomas v. Thomas' Estate,* 64 Neb. 581, 90 N. W. 630; *Moen v. Moen,* 16 S. Dak. 210, 92 N. W. 13; *Brock v. State,* 85 Ind. 397; *In re De Laveaga's Estate,* 142 Cal. 158, 75 Pac. 790; *Mund v. Rehaume,* 51 Colo. 129, 117 Pac. 159; *Miller v. Pennington,* 218 Ill. 220, 75 N. E. 919, 1 L. R. A. N. S. 773; *Grant v. Mitchell,* 83 Me. 23, 21 Atl. 178; and other cases. A competent witness need not be a subscribing witness. *Blythe v. Ayres, supra; In Pederson's Estate, supra; Grant v. Mitchell, supra.* The law of the father's domicile governs legitimation. *Blythe v. Ayres, supra; Moen v. Moen, supra.* The testimony in the case establishes a valid slave marriage. *Lee v. Lee,* 161 Mo. 52, 61 S. W. 630; *U. S. v. Route,* 33 Fed. 246; *Hardin v. Hardin* (Ky.) 87 S. W. 284; *State v. Bittick,* 103 Mo. 183, 15 S. W. 325; *Lindsey's Devisee v. Smith,* 131 Ky. 176, 114 S. W. 779; *Thompson v. Nims,* 83 Wis. 261, 53 N. W. 502.

For the respondent there was a brief by *R. A. Watkins* and *Geo. B. Clementson,* and oral argument by *Mr. Watkins.* They contended, *inter alia,* that strict proof of parentage must be furnished independent of the acknowledgment. *In re Jessup's Estate,* 81 Cal. 408, 435, 22 Pac. 743; *Blythe v. Ayres,* 96 Cal. 532, 589, 31 Pac. 915; *In re Gorkow's Estate,* 20 Wash. 563, 56 Pac. 385. In this case there was no sufficient writing. *Lind v. Burke,* 56 Neb. 785, 77 N. W. 444; *Moore v. Flack,* 77 Neb. 52, 108 N. W. 143; *Grant v. Mitchell,* 83 Me. 23, 21 Atl. 178.

VINJE, J. Appellants contend the evidence shows (1) that *Martha* was born in wedlock; (2) if not, that she is the illegitimate child of Thomas Richmond; and (3) that he sufficiently acknowledged her in writing to be his child to entitle her to inherit.

It appears from the evidence that Thomas Richmond was born a slave in Randolph county, Missouri, near College

Mound, on the farm of Samuel Richmond, who owned his parents, John and Queen Richmond. They lived together in a separate cabin and continued to be the slaves of Samuel Richmond until slavery was abolished in Missouri about January 1, 1865. Thomas was upon the Richmond place as a slave from the time of his birth until he left, about January 30, 1864. Margaret, a daughter of Samuel Richmond, married one Caswell Smith, and they lived upon a farm adjoining the Richmond place. One of the slaves owned by Caswell Smith was Sarah, who was known by the name of Sarah Smith. Caswell Smith inherited her from his father, who lived in North Carolina, and she was brought to Missouri some ten years before the war. She was then grown and had a child who afterwards died. After coming to Caswell Smith's place she had a girl child, a mulatto, who died when three or four months old. Her next child was a boy, colored, named William, who died about 1870; her next child was a girl, colored, named Adeline, who died about 1890; and her next child, was a girl, *Martha,* colored, who is one of the appellants in this case. The date of her birth is in dispute, and is variously testified to as having been as early as 1863 and as late as 1865. About January 30, 1864, Thomas Richmond ran away from the Samuel Richmond place and went to Macon, about twenty miles distant, and on January 31st enlisted for three years in the Union army. He was mustered into service at Benton Barracks, St. Louis, on February 8, 1864, and was discharged June 14, 1865. According to his discharge he was then twenty-five years of age. Thomas Richmond frequently visited Sarah Smith and had intercourse with her, certainly as late as January 30, 1864. Sarah, however, never assumed the name of Richmond, but up to the time of her death at Macon, Missouri, about 1886, was known only by the name of Sarah Smith. *Martha,* now called *Richmond,* up to the time she came to Wisconsin in 1891 was known by the name of *Martha Smith.* After Thomas Richmond's discharge from the Union army he worked in St.

Louis and in Illinois, and came to Grant county, Wisconsin, in 1866 or 1867, and continued to reside there until his death in 1909. Most of the time he lived on a small farm in the town of Beetown, near Lancaster, but some of the time he lived in Lancaster. A few years after Thomas settled in Grant county, and about 1871 or 1873, he went back to Missouri to bring his father and mother to Wisconsin, and did so. From statements he made before he went it seems he contemplated bringing with him Sarah Smith also. When he went into the army she had two children living, William and Adeline, of whom Thomas spoke as his own; he also spoke of Sarah as his wife. He found, however, when he returned to Missouri that, besides *Martha,* there had been born to Sarah two other children, one known as Sam Oliver and the other called Bob. He did not bring Sarah with him to Wisconsin. From the time the parents of Thomas came to Wisconsin they lived with him on his farm near Lancaster. In 1891, his mother becoming feeble and desiring to have assistance for her in the house, he, through others, as he could neither read nor write, sent several letters to *Martha* requesting her to come to Wisconsin and live with them. Only one of these letters, which was written by Mr. John Carthew, has been preserved. It reads as follows:

"LANCASTER, Wis., Sept. 19—91.

"*My Dear Daughter:* Your letter of the 2nd of this month duly came to hand. I have been so very busy could not answer before. I am first rate but mother is not so very well. You speak of coming on railroad. You had better come on to Cassville, Grant Co., Wis., on the C. B. and Northern and I will meet you there if you will send me a letter a week ahead what day you will start or when you will arrive at Cassville. Hoping you are all well and will come all safe soon, I am, Your affectionate father,

"THOMAS RICHMOND."

The envelope in which this letter was sent has not been preserved, and Mr. Carthew cannot swear positively to what ap-

peared thereon. Mr. John Mankel and Mr. N. H. Suttle also wrote letters to *Martha* for Thomas about the same time. Each testifies that he cannot remember the contents of the letters except that they concerned *Martha's* coming to Wisconsin. The recollection of the witnesses is that said letters began "Dear Daughter" or "Dear Daughter Martha" and that they were signed "Your father, Thomas Richmond."

Martha came to Grant county in 1891 and lived upon the Richmond place with Thomas for eight or nine years, when a difference between them arose and she went to Lancaster and worked out for a while, during which time she occasionally visited him on his farm. She then went back to the farm for a short time, but afterwards went to South Dakota, and from there to Phœnix, Arizona. Some weeks before Thomas died, and while he was sick, he sent money to her to pay for her return to Wisconsin, and she came back and was with him during the last two weeks of his life. He died June 22, 1909, leaving an estate inventoried at about $5,000. He left surviving him two brothers, *Henry Richmond,* the respondent, and Peter Richmond.

Thomas Richmond was a pensioner of the United States. Under date of January 15, 1898, the pension bureau at Washington sent to him certain questions to be answered and to be returned with his next quarterly voucher to the pension agents at Milwaukee. He signed the paper by mark under date of July 5, 1898, and answered some of the questions. To the question, "Are you married? If so, please state your wife's full name and her maiden name," the answer given was, "No. Wife is dead. Maiden name was Sarah Smith. Died in Macon City, Missouri, in the year 1868, as near as I can remember." To the question, "When, where, and by whom were you married?" no answer was given. To the question, "Have you any children living? If so, please state their names and the dates of their birth," the reply was "Yes, *Martha Richmond.* I think she was born in the year 1865."

These statements were made out for Richmond by one W. E. Webb, in whose presence they were signed. The date of Sarah Smith's death should have been given as 1886 instead of 1868. How the mistake occurred does not appear.

The trial court found that *Martha Richmond* is not the child of Thomas Richmond, and that any acknowledgment of her as his daughter made by Thomas was made through his mistake as to her paternity. The trial judge evidently based his findings upon the truth of the testimony contained in the depositions of Margaret Smith and Margaret E. Terry, both of whom testified that *Martha* was born in December, 1864. It is a verity in the case that Thomas Richmond left the Samuel Richmond place about the last of January, 1864; that he joined the service at Macon, Missouri, January 31st, and was mustered in February 8th at Benton Barracks, St. Louis. If it be a fact that *Martha* was born in December, 1864, and that, as found by the trial court, Thomas did not have access to or intercourse with Sarah Smith later than January 30, 1864, then it follows that *Martha* is not the child, legitimate or illegitimate, of Thomas Richmond. If, however, *Martha* was born before Thomas Richmond went into the army, as testified to by Milly Smith, or if Thomas Richmond had intercourse with Sarah after he joined the army, or if *Martha* was born on or before November 1, 1864, then the basis upon which the trial judge made his findings falls. Macon, at which place Richmond joined the army, was only twenty miles from the Samuel Richmond place. While the testimony is to the effect that he was not seen in or about the Richmond neighborhood after he left it to join the army, still it cannot be said to be an absolute verity that he did not return during his term of service. It is also apparent from the testimony of Margaret Smith and Margaret E. Terry that their recollection of the birth of *Martha* as occurring in December, 1864, was vague and unsatisfactory. It is true that Margaret Smith, who was seventy-five

years old at the time her deposition was taken, bases her evidence, that she knew the time of *Martha's* birth, upon the recollection that she was born about a month later than her own son, and he was born November 7, 1864. She testifies, however, that she had not refreshed her recollection from any records or documents at the time she gave her testimony, and it is apparent on reading it that she was much confused as to dates, which of course would be natural for a person of her age, especially considering the remoteness in time of the facts to which she testified. As an instance of how the witness confused dates the following will suffice: To the question, "Tell us as near as you can about when he left to go to the army?" she replied, "He left during the winter, along after Christmas in 1864, as well as I remember." Her counsel then suggests, "You mean in 1863 after Christmas, don't you?" and she answered, "What I meant was 1863." "*Q*. You mean after Christmas, 1863?" "*A*. It is *1864* after Christmas, I guess. Just not knowing these things beforehand I just can't remember. I am getting old." The testimony of Margaret E. Terry, who was seventy years old at the time her deposition was taken and who lived on a farm adjoining that of Samuel Richmond, is still more vague and unsatisfactory. She does, however, testify that *Martha* was born in December, 1864, but she says she was not present at her birth, adding: "I am white and she was a low-down, black slave. We didn't visit negroes." The addendum suggests at least the unimportance of the event to her. She claims she remembers the date by a remark her mother made at the time *Martha* was born, but what that remark was is not disclosed by the testimony.

Were the question of the paternity of *Martha* dependent solely upon the date of her birth, as shown by the testimony, then this court would perhaps not disturb the finding of the trial court that *Martha* was not the child of Thomas Richmond. But in our view of the case the question of the pa-

ternity of the child must be determined not alone upon the testimony as to what particular month and year *Martha* was born, but upon the whole evidence in the case. It is obvious that two women of the ages of seventy and seventy-five, respectively, called upon to testify as to the month and year in which a negro child was born forty-six years previously, without any opportunity for refreshing their recollections from family records or otherwise, would be apt to make a mistake of at least a few months, if not years, as to the date of such birth. Such a mistake, even as to the date of the birth of one of their own children, would not be strange or unlikely, much less that of a child of a negro slave. We deem the fact that Thomas Richmond up to the time that he had the misunderstanding with *Martha* in 1901, and even thereafter, shortly before he died, always spoke of and acknowledged her as his child, more persuasive and controlling than the testimony of the two above mentioned witnesses. No one was in a better position to know the truth of the matter than were he and Sarah Smith, and it does not appear that either of them claimed *Martha* had any other father than Thomas Richmond. The latter, in 1898, when answering the pension department, said *Martha* was his daughter, and that he believed she was born in 1865. He fixed the date of her birth later than did Margaret Smith and Margaret E. Terry. It seems, therefore, that Thomas Richmond did not regard the fact that *Martha* was born as late as 1865 as any reason why he was not her father. As before stated, he knew best whether or not it was, and his conclusion on that subject, adhered to for practically over forty years, ought not to be lightly brushed aside or nullified by the dim, uncertain memory of two old women as to the exact date of such an unimportant event as the birth of a slave child over forty-seven years ago.

The trial judge speaks of Thomas having acknowledged *Martha* to be his daughter under a mistake as to her paternity.

The record is barren of any fact that came to the knowledge of Thomas Richmond as to the paternity of *Martha* after 1872. In 1871 or 1872 he visited Macon, Missouri, where Sarah Smith then lived, and where she continued to live till the time of her death in 1886. He then knew that she had several children of which he was not the father, yet as late as 1891 he writes to *Martha* and addresses her as "Dear daughter" and signs himself "Your father" or "Your affectionate father." She came to live with him and kept house for him for eight or nine years, during which time he held her out as his daughter, spoke of her as such, and she was known as such in the neighborhood in which he lived. That the children William and Adeline were his is not disputed, although they were known by the name of Smith in Macon, where they resided until their death. Practically the only doubt that is cast upon the paternity of *Martha* is the testimony of Margaret Smith and Margaret E. Terry to the effect that she was born in December, 1864. If there be a mistake as to that, then there is no greater uncertainty as to the paternity of *Martha* than of that of Adeline and William. We have therefore reached the conclusion that the county judge was correct in finding that *Martha* was the child of Thomas Richmond and that the trial court erred in finding that she was not the child, either legitimate or illegitimate, of Thomas Richmond.

It is strenuously urged by the appellants that Thomas Richmond and Sarah Smith were married according to the custom of slaves and that *Martha* was born in wedlock. There is considerable testimony to sustain the claim of such marriage. Of course if there was a lawful marriage *Martha* needed no legitimation. Assuming, however, that *Martha* was illegitimate, the question arises, Did Thomas Richmond in writing acknowledge himself to be her father so as to entitle her to inherit his estate? Sec. 2274, Stats., provides that "Every illegitimate child shall be considered as heir of

the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." At least two facts must co-exist to constitute legitimation under the statute, namely, an illegitimate child and a written acknowledgment of the paternity thereof by some person according to the statutory provisions. The statute applies only to illegitimate children. *Grant v. Mitchell,* 83 Me. 23, 21 Atl. 178. But it is not essential that the written acknowledgment shall be made for the express purpose of establishing heirship or of a compliance with the statute. It may be made in entire ignorance of the statutory requirements and for purposes other than that of creating heirship, provided there is otherwise a compliance with the statute. *In re Rohrer,* 22 Wash. 151, 60 Pac. 122; *Blythe v. Ayres,* 96 Cal. 532, 31 Pac. 915. Its requirements are an acknowledgment by a person in writing, signed in the presence of a competent witness, that he is the father of the illegitimate child. When such a writing is produced the statute is satisfied. It does not require that the witness should attest or subscribe the writing or acknowledgment—only that the person making it shall sign in the presence of the witness. *In re Pederson's Estate,* 97 Minn. 491, 106 N. W. 958; *Blythe v. Ayres, supra.* Neither does it require that the acknowledgment of paternity shall be in precise formal language. It is sufficient if it appear with reasonable clearness and certainty from the written words that the paternity of the child is acknowledged. *Crane v. Crane,* 31 Iowa, 296. So, also, the law of the domicile of the person making the written acknowledgment, and not that of the domicile of the child or the mother, governs the question of legitimation. *Blythe v. Ayres, supra; Moen v. Moen,* 16 S. Dak. 210, 92 N. W. 13.

In the present case, in reply to inquiries made by the government relative to a matter of great importance to the deceased, he declared that *Martha* was his daughter. The acknowledgment of paternity was made in unmistakable terms and under such circumstances as to exclude inadvertence or mistake. The instrument was signed by him in the presence of Mr. Webb, a competent witness. It must be held that such writing fully satisfies the requirements of the statute. The pension statement is supplemented by letters written to *Martha* addressing her as daughter, or dear daughter, in which the deceased declared himself to be her father. At least one of these letters was signed by him, through Mr. Carthew, and in his presence as a competent witness. A number of cases, in addition to those already mentioned, in which various similar declarations have been held a sufficient acknowledgment of paternity under substantially similar statutes, is added for reference. *Brown v. Iowa Legion of Honor,* 107 Iowa, 439, 78 N. W. 73; *Britt v. Hall,* 116 Iowa, 564, 90 N. W. 340; *In re De Laveaga's Estate,* 142 Cal. 158, 75 Pac. 790; *Thomas v. Estate of Thomas,* 64 Neb. 581, 90 N. W. 630. In the following cases the evidence was held insufficient to show acknowledgment under the statute: *Watson v. Richardson,* 110 Iowa, 673, 80 N. W. 407; *Lind v. Burke,* 56 Neb. 785, 77 N. W. 444; *Moore v. Flack,* 77 Neb. 52, 108 N. W. 143.

The question is raised by counsel for appellants that since the deceased, in compliance with the statute, acknowledged *Martha* to be his daughter, she is entitled to inherit even though in fact she was not his child. Having found that he was her father, it becomes unnecessary to decide the question, and it is reserved for future determination.

By the Court.—Judgment reversed, and cause remanded with directions to affirm the judgment of the county court.

SLOAN, Special Administratrix, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

December 12, 1912—January 7, 1913.

Appeal: Questions of fact: Weight given to decision of trial judge: Special verdict: Changing answers: Evidence: Sufficiency: Railroads: Negligence: Death of switchman.

1. Because of the superior opportunity of the trial judge for reaching a right conclusion, his decision as to whether there is a jury question for solution will not be disturbed on appeal unless manifestly wrong.
2. Plaintiff's intestate, while in charge of a switching crew in defendant's yards, was run down and killed by cars which ran upon the wrong track because of the failure to turn a switch. Upon evidence showing that it was the duty of the deceased on this occasion to turn the switch and to give the signals for the movements of the cars, and that up to the time he stepped into the region of danger and was killed the movements of the cars were under his personal direction, it is *held* that the trial court was warranted in changing findings in the special verdict to the effect that negligence of other members of the crew directly contributed to the death, and in dismissing the action.
3. The special verdict having been thus changed so as to negative the existence of negligence on the part of any one except the deceased, it is immaterial that the trial court did not formally set aside or change other findings by the jury to the effect that it was the duty of one of the other men to turn the switch (which finding was contrary to all the evidence), and that the negligence of the deceased was slighter as a contributing cause to the injury than that of the other switchmen.
4. In such a case judgment might have been given in favor of defendant notwithstanding the verdict, without changing any of the findings therein; but the usual and better practice is to shape the verdict so that on its face it forms a basis for the judgment.

TIMLIN and KERWIN, JJ., dissent.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover compensation for damages caused to the widow of Frank Sloan, by his death, alleged to have been pro-

duced by negligence of defendant's servants. Issues were duly joined. All conditions precedent to the right to maintain the action were alleged and admitted or proved.

The evidence established as facts, the following: In the nighttime of September 9, 1909, while the intestate was on duty in defendant's yards at La Crosse, Wisconsin, in charge of a switching crew he was run down and killed by cars which were being moved under his direction. Besides the engineer and fireman there were two men associated with Sloan, Mr. Kessler, as head brakeman, and Mr. Hawkins, as rear brakeman. It was a dark, foggy night. Because of such condition Kessler was stationed rather nearer the engine than usual so he could readily receive signals from Sloan and repeat them to the engineer. It was Hawkins's duty to ride the rear cars and as they were, from time to time, spotted to set the brakes. Because of fog and darkness Sloan assumed the duty of throwing the switch for the movements leading up to the accident. The engine was operating "head on" with a string of cars and a caboose. There were several sidetracks, substantially parallel with a main track, and connected therewith, directly or indirectly. Just prior to the particular movement the engineer executed orders to set a caboose in on what was known as track 1. Failing to do so efficiently by the first effort, there was a return and the caboose was "kicked" on to a satisfactory clearance. Hawkins rode the caboose to its position and set the brakes. Sloan was in front of the caboose or between it and the particular switch. Kessler was on the moving cars, toward the engine, where he could receive and transmit signals as before indicated. The movement next to be executed, according to Sloan's orders was to recede to a clearance of the switch to track 1 and that to track 4, and then return and push the cars in on the latter, the switches being properly turned for that purpose. By inadvertence they were not turned so as to direct the cars in on track 4 but were left so as to give direction back in on track 1.

Sloan gave the signals for the return movement. They were received by Kessler and repeated to the engineer. Hawkins about this time descended from the caboose and, after having some altercation with a trespasser near by, passed over toward track 4,—the one on which the cars were expected to come. Sloan was near the particular switch just before the return movement of the cars. Kessler was some distance away on the moving cars and some six car lengths from the rear. On account of the conditions, he could not see Sloan's person but could see his lantern. He could not see definitely, what track the cars were on. His attention was directed to receiving the signals from Sloan and repeating them to the engineer. The initial signal for the return movement was given by a person standing near the particular switch. There was no other person at that point except Sloan. After such initial signal, others were given for a continuance of the return movement, the person giving them, at the same time going in the direction the cars were moving and on or near track 1. Soon after the last signal was given, he disappeared and soon thereafter Hawkins, who had observed him step into the pathway of the coming cars, a short distance therefrom and endeavored, but too late, to arouse his attention to the peril, succeeded in efficiently signaling for the movement of cars to stop. Sloan was found dead about where Kessler had seen his lantern disappear after the last signal to come on was given. About the time Sloan was seen at the switch he had some altercation with a trespasser on the track, presumably the same one who had attracted the attention of Hawkins.

Upon the theory that the evidence tended to show that Sloan came to his death by reason of his own carelessness and that, if there was any efficient negligence on the part of his associates it was either in the conduct of Kessler or Hawkins, and with the firm conviction, as stated by the judge, that there was no warrant in the evidence for a finding of such negli-

gence, the cause was submitted to the jury for answers to special questions, resulting in substantially these findings, among others, in the whole, if warranted by the evidence, entitling plaintiff to recover: Kessler was guilty of want of ordinary care proximately causing the death of Sloan. Hawkins was also guilty of such want of care. Sloan was guilty of efficient contributory fault. His want of care was of lesser degree than that of the trainmen. It was Hawkins's duty to turn the switch.

Upon motion the trial court changed the finding as to negligence of Kessler and also as to negligence of Hawkins, characterizing the reversal by a decision to the effect that there was no warrant for the finding that it was the latter's duty to turn the switch, and ordered judgment dismissing the action with costs, which was accordingly rendered.

For the appellant there were briefs by *A. E. Bleekman* and *Frank Winter,* and oral argument by *Mr. Winter.*

For the respondent there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *Paul W. Mahoney,* and oral argument by *Mr. Killilea.*

MARSHALL, J. It does not seem best to review the evidence here, in detail, to demonstrate the correctness of the conclusion to which we have arrived. The statement of facts sufficiently justifies that. It indicates that the opinion which the trial judge had at the close of the evidence was well grounded. On the motion to correct the verdict and for judgment in respondent's favor, he carefully reviewed the evidence; showing that it was the duty of Sloan, and of no one else on the particular occasion, to turn the switch; that it was his duty, and that of no one else, to give the signals for the movement of cars; that he, and no one else, gave the signals, and that the movements, up to the time he stepped into the region of danger and was killed, were under his personal direction.

From the nature of the case, the rule applies, very strongly, that in determining whether there is a jury question for solution the trial judge has such superior opportunity for reaching a right conclusion as to the matter of fact involved,—that is as to whether there is room in the evidence for a determination to a reasonable certainty in either of two ways, that his decision is entitled to such weight on appeal as not to be legitimately disturbable without a manifest showing of its being wrong. The mere fact, looking at the printed record alone, that we would incline to a different view, is not sufficient. The weight of superior opportunity below to discover the right of the matter, would still bear down the scales in favor of the decision complained of. All reasonable doubts arising from the record itself, and those arising from appreciably contemplating the peculiarly advantageous position of the trial judge, must be overcome, in such a case as this, in order to successfully challenge the initial decision. As has been said, over and over again, that dignity is due to the decisions of trial judges on matters of fact. The letter and spirit of our system of jurisprudence demands and commands it. Justice, in general, will be most certainly effectuated by this court firmly adhering to such rule. Such a course will give courage and stimulus to trial judges to perform the whole duty of their high office and shape litigation speedily, directly, economically, and certainly as practicable, to a finality. Any other course would strongly tend to weaken trial jurisdictions where there is most need of executive strength and judicial courage.

Testing the record before us by the rule indicated, we fail to discover any fair ground for disturbing the judgment appealed from. We come far short of being able to say the court below was wrong in deciding that there was no evidence of negligence on the part of either Kessler or Hawkins. The fact that the finding as to Hawkins's duty to turn the switch was not formally changed or set aside, is immaterial. The

erroneous notion entertained by the jury, if they intelligently considered the matter at all, that Hawkins was negligent must have been grounded on the theory, which is not only without support in the record but contrary to all the evidence on the subject,—that it was his duty to turn the switch. Therefore the change of one in effect changed the other; and, in any event, the court might have granted judgment in defendant's favor, notwithstanding the verdict, without changing any of the answers; though to first shape the verdict so as, on its face, to form a basis for the judgment, is the usual practice and is the formal, if not the best, though not essential way. What is said on this subject applies to the fact that the finding as to the negligence of Sloan being slighter than that of the trainmen was not changed. The change so as to negative there having been negligence of any one but Sloan, carried with it the comparative found feature of his negligence. Moreover, his fault, in the judgment of the trial court, appeared conclusively from the evidence, leaving the jury finding in the case, really immaterial.

By the Court.—Judgment affirmed.

The following opinion was filed January 28, 1913:

TIMLIN, J. (*dissenting*). If I could make myself believe that "because of the fog and the darkness Sloan [decedent] assumed the duty of throwing the switch for the movements leading up to the accident," I would have no difficulty in agreeing with the majority opinion in this case. The case turns upon this point of fact. Although of opinion that the evidence was insufficient to support a verdict for plaintiff, the trial court submitted the case to the jury, who found by special verdict that plaintiff's decedent, Frank Sloan, and his two associate switchmen, Kessler and Hawkins, were each guilty of negligence directly contributing to the injury and death of Sloan, but that the negligence of Sloan was slighter.

The jury also found that it was Hawkins's duty to see that the switch in question was properly turned at the time and place in question, and that the decedent did not give the signals for the moving of the train immediately prior to the injury which resulted in his death. This verdict would, under the statute in force, have entitled plaintiff to judgment for the damages of $2,000 found. But the learned circuit judge changed the answers of the jury so as to say that the negligence of the deceased was greater, and so as to say that it was Sloan's duty to see that the switch was properly turned, and upon the verdict thus changed gave judgment for defendant.

Sloan was foreman of the switching crew, which, excluding the engineer and fireman, consisted of Sloan, Kessler, and Hawkins. The only eye-witnesses were one Harry Gifford, an employee of defendant but not a member of Sloan's crew, and Kessler and Hawkins. The injury occurred at 11:40 p. m. and the night was dark and foggy. A series of quite parallel switch tracks lay northerly of the main track and extended with it northeasterly and southwesterly. The witnesses refer to the first as "east" and to the second as "west." That track next northerly of the main track is known as track 1; next north of this is track 2; next north of this lie tracks 3 and 4 in the order named. There are other tracks substantially parallel with and north of track 4 and other tracks south of the main track, but they cut no figure in this case. It is seven and one-half feet from the north rail of track 1 to track 2, six feet between tracks 2 and 3, and seven feet between tracks 3 and 4, all at a point opposite the switch shanty which is called in the evidence Camp 20. Southwesterly of Camp 20 these tracks connect with switches. The distance from switch 1 northeasterly to Camp 20 is 200 feet. Switch 1 connects track 4 with track 1. The distance from switch 1 northeasterly to switch 2 is ninety feet. Switch 2 connects track 4 with track 2. The distance northeasterly from switch 2 to switch 3 is eighty-nine feet. Switch 3 con-

nects track 4 with track 3. It will thus be seen that between tracks 1 and 4 are tracks 2 and 3, the southwesterly end of track 4 forming what is called in railroad parlance a lead for tracks 2 and 3; that with switch 1 open for track 4, cars would be shunted from track 1 onto track 4; moving along that track ninety feet they would encounter switch 2, which if opened for track 2 would shunt the cars onto track 2; but if switch 2 was not opened, moving along further northeasterly eighty-nine feet on track 4 they would come to switch 3, which if opened for track 3 would shunt the cars into track 3. Sloan was found lying dead directly south of the switch shanty, with his right leg and arm on the north rail of track 1, his lantern on the platform of the caboose, which had been backed down on track 1 northeasterly of where his body was. He had his train lists in his dead hand.

The train movements preceding the injury were as follows: A switch train with thirteen or fourteen cars and a caboose was on track No. 2 and desirous of putting some of these cars but not the caboose on track 4. They desired to put the caboose on track No. 1. The caboose was the last or rear car. To do this they pulled southwest, passed over the switch connecting track No. 2 with track No. 4, over track No. 4 to switch No. 1, connecting track No. 4 and track No. 1, and far enough southwest on track No. 1 to clear switch No. 1, and then far enough northeast so as to back the caboose in on track No. 1 past switch No. 1 and uncouple it. It required three moves to do this: one movement to the southwest on tracks 2, 4, and 1 over switches 2 and 1, then one movement to the northeast on track No. 1, then uncoupling the caboose, then a "kickback" to the northeast so as to cause the caboose to clear the other cars which might come in on the switch track. Having got the caboose down on track No. 1 to a point about due south of Camp 20, they pulled southwesterly again along track No. 1 far enough to clear switch No. 1, and backed in on signals believing that switch

No. 1 had been thrown and that they were backing in on track No. 4, but instead backing in directly on track No. 1, where they struck and killed Sloan.

It is very obvious that the neglect to throw switch No. 1 for the last backward or northeast movement and so shunt the cars onto track 4 was the negligent act which caused the injury in question. If we were to accept the words of the switchman Kessler without discrimination, the decision of the trial court might be sustained, because he said Sloan told him *just before they pulled out over No. 2 switch* that he, Sloan, would turn switch No. 1. But there is also other evidence, and therein lies the error in taking this case from the jury. This evidence consists of the circumstance that Sloan was found dead on track No. 1 clutching his train sheets in his hand and with his lantern resting on the southwesterly platform of the caboose. Next, of the testimony of Harry Gifford, who sat in the door of Camp 20 looking toward Sloan and part of the time talking with him, and about seventy-five feet distant. He testifies:

"Sloan stayed there by the caboose when the train went west. He and I joshed back and forth, talking. He was looking over his list. His lantern was either on his arm or on the platform of the caboose. The train pulled west on number 1 track. Sloan gave no signals. This caboose was in front of the shanty. Sloan hollered to the rest of the crew to come down either 2 or 4 track, I couldn't say which. After he called he stayed right by the caboose. He was standing there, and then I saw the cars coming back there on number 1 track. Then I saw him get killed. At the instant he got killed I put my hands to my ears. I thought he was going to holler."

There are some contradictions and some discrepancy between this testimony and that which he gave at the inquest, but nothing to take the question of his credibility from the jury. Gifford further testified that the first he saw of Hawkins the latter was walking northwest toward Camp 20 after

the accident, coming from the southeast. This was not coming from the direction of track 4. Kessler, for the defense, testified that he was head brakeman and Hawkins rear brakeman; that Sloan told them to take the caboose out of track No. 2. They then went west, the engine facing east, and Sloan gave the signal to him to stop when they pulled out from No. 2 west. Sloan then went west across No. 1 track—to throw the switch he supposed.

"If it had been a clear night it would have been my business to throw that switch, but he told me to stay with the engineer where he could see me and he would take care of the switches. I moved near enough to the engineer for him to see my signals. Sloan ought to have thrown that switch. Sloan gave me a signal to go ahead two or three car lengths. First he gave a high ball. I gave them to the engineer. Frank was about seven or eight car lengths from me at that time. The engine then moved east. Sloan said he would throw the switch *when he was right up to the engine coupling on No. 2. He then started to walk east on track No. 2.*"

It will be observed that walking east on track No. 2 was walking away from switch No. 1. It will also be observed that Mr. Kessler entirely omits the forward-and-back movement which they made after leaving track No. 2 with the caboose for the purpose of putting it on track No. 1, and the second back movement on track No. 1 for the purpose of kicking the caboose northeasterly to clear the switch. Now, if at the time they moved out of track No. 2 Sloan said he would throw the switch, he evidently did throw the switch, because after that they had deposited the caboose on track No. 1, and that could not have been done unless the switch was thrown for track No. 1. So it is evident the testimony of this witness does not relate to the movement which resulted in the death of Sloan, but to a prior movement, and that he is concealing something. He continues:

"The last I saw of Sloan he gave me a car-length signal about four or five minutes before he was killed. The cars

kept moving right along. We went one or two car lengths after Hawkins gave me the signal to stop. Hawkins came from the north. . . . After Sloan said he would throw the switch he walked east down No. 2 track. I was on the ground. At the time we pulled across the switch Sloan was nearer."

From this it is apparent that both of these men were near the switch No. 2, both on the ground, and that Sloan proceeded east, which was away from switch No. 1, and that the other man, if he followed his train westwardly, passed switch No. 1. On cross-examination he explains that he did not see Sloan give signals, but saw the lantern signals and thinks Sloan gave them. That the person who gave him the high-ball signal to come ahead was at switch 1 where he went across. He testifies that he last saw Hawkins on track No. 2 before the accident when they pulled out from that track, and did not see him again until the accident. Hawkins was then on track No. 2, about ten car lengths from switch 2, and walking east. He reiterates that Sloan told him that he, Sloan, would throw switch 1 *just before they pulled out over switch 2.* They were to come over No. 2 switch and over No. 1, and No. 1 switch was to be turned and Sloan turned it. This, I think, shows that he is not talking about the movement made at the time of the injury, but a prior movement. He says:

"We pulled west out of track No. 2 and backed the caboose on track No. 1. It would not clear, and then we shoved against it again and thought it cleared. Then he gave me the signal to go west over switch 1. *I thought he would turn the switch so we would go down on lead 4.* Instead of this we went back on No. 1 track."

As I understand this testimony, it does not contradict that of Gifford, and the statement of Sloan that he would turn the switch related to the first movement to move the caboose from track No. 2 onto track No. 1. That the switch was turned and this movement was made, and a second movement to kick

the caboose back further so as to clear the switch, and then another southwesterly movement, and then the last and fatal movement, is beyond dispute.

Now it cannot be said that because Sloan, on the first movement, told Kessler he would throw switch No. 1 to make the connection necessary to place the caboose on track No. 1, that he would continue to throw switch No. 1 for any future movement. Having got the caboose at the desired place he gives orders to his men to put the other cars on track No. 4 and applies himself to an inspection of his train sheets. These men then scatter. Kessler goes west, either riding or walking, passing over switch No. 1; Hawkins, according to his story, goes north to No. 4 track to open the knuckles on the cars there, and the train, after clearing No. 1 switch, and without knowing whether it has been turned or not, backs in again on No. 1 track upon Sloan while he is engaged in examining his train sheets. Kessler testifies to facts which would indicate that the signals for the last northeast movement, which resulted in Sloan's death, were given by Sloan. Gifford, who was watching Sloan at the time and talking with him, says Sloan gave no signals. The fact that Sloan stood right in the path of the train examining his train sheets by the light of his lantern is strong evidence to show he did not think the train was backing in on that track. If he gave the signals he must have understood that switch No. 1 was open for track No. 4. He knew he had not opened it. If he did not give the signals, as Gifford testifies, then Hawkins gave the signals and gave them recklessly, without reference to whether switch No. 1 was turned for track No. 4 or track No. 1.

The case is not very large or very important, but after a man's lips are closed in death I do not like to see his legal rights sworn away by the suspicious testimony of survivors interested in exonerating themselves. I think under the circumstances the evidence should be carefully scrutinized, and

a careful scrutiny of this evidence convinces me that there were facts in controversy determinative of the case upon which a jury should have been allowed to pass. I think any experienced railroad switchman would unhesitatingly say that when a switching foreman, after having thrown a switch, walks away from it, and after the cars are thrown in to the required track and the foreman then gives another order to his men to put cars in on another track, such latter order includes passing beyond the switch so as to clear it and throwing the switch for that other track. I think that is what the evidence shows was done in this case.

I cannot assent to the correctness of the following in the opinion of the court:

"All reasonable doubts arising from the record itself, and those arising from appreciably contemplating the peculiarly advantageous position of the trial judge, must be overcome, in such a case as this, in order to successfully challenge the initial decision."

As I understand this, it means to say that the decision of the trial court changing the answer of the jury to one or more questions of a special verdict must be affirmed, unless the contrary appear beyond all reasonable doubts growing out of or suggested by the printed evidence or by considering the advantage which the circuit judge had in seeing and hearing the witnesses and observing their demeanor and manner of testifying. I do not think such weight can be given to the decision of the court below upon what is in legal effect a demurrer to evidence, without invading the constitutional right of the suitor to a trial by jury.

In *Klein v. Valerius,* 87 Wis. 54, 57 N. W. 1112, a statute was held unconstitutional which attempted to make it the duty of this court to review all questions of law or fact presented by the record upon appeal or writ of error and to examine and review the evidence when the same is preserved by a bill of exceptions and give judgment upon the right of the

case, regardless of the decisions upon questions of fact or law made by the court below. It was suggested that the determination of questions of fact must remain as at the time of the adoption of the constitution, citing *Callanan v. Judd,* 23 Wis. 343. Sec. 5, art. I, Const., secures the right of trial by jury in civil cases. *Bennett v. State,* 57 Wis. 69, 14 N. W. 912. Where the question of negligence is of a mixed character, one of law and fact, it must be left to the jury. *Patten v. C. & N. W. R. Co.* 32 Wis. 524. Mixed questions of law and fact are to be submitted to the jury under proper directions. *Bass v. C. & N. W. R. Co.* 36 Wis. 450. Where conflicting and indecisive evidence is given upon questions of fact it is for the jury to determine its force and effect. *Saunderson v. Lace,* 2 Pin. 257. Where there is evidence for each party upon a material point, though positive upon the one side and indefinite upon the other, the weight of such evidence is a question for the jury. *Calder v. Crowley,* 74 Wis. 157, 42 N. W. 266. This is also the rule where the solution of the question depends upon circumstantial evidence. *Agnew v. Farmers' Mut. P. F. Ins. Co.* 95 Wis. 445, 70 N. W. 554. The mere fact (as shown by the record in this case) that the trial judge believes that if a verdict should be rendered for the plaintiff in a personal injury case it ought to be set aside as against the weight of evidence, does not justify him in withdrawing the case from the jury. *O'Brien v. C. & N. W. R. Co.* 92 Wis. 340, 66 N. W. 363.

Many such cases might be cited, and in the early history of this court this command of the constitution lay with serious and heavy control upon the judges of this court. As a logical consequence of this view there obtained also the rule that a motion for a nonsuit presented a question of law, the facts being admitted with all their proper effect in law (*Hunter v. Warner,* 1 Wis. 141), and that a nonsuit for insufficiency of evidence could be granted only where there was no evidence which upon the most favorable construction it would

bear and no inferences of fact capable of being logically drawn therefrom which would justify the jury in finding for the plaintiff. *Douglass v. Garrett,* 5 Wis. 85; *Johnston v. Hamburger,* 13 Wis. 175; *Jarvis v. Hamilton,* 19 Wis. 187; *Sutton v. Wauwatosa,* 29 Wis. 21; *Gower v. C., M. & St. P. R. Co.* 45 Wis. 182; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575, 7 N. W. 544; *Imhoff v. C. & M. R. Co.* 22 Wis. 681; *Houfe v. Fulton,* 29 Wis. 296.

Many other cases might be cited. The first invasion of these rules is found, I think, in *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 38, 73 N. W. 573. While professing to follow the prevailing rule of law above referred to, several qualifications are added. The legal effect of evidence is to be measured by a new standard, that is, it must, in order to be taken from the jury, be so clear and conclusive as not to admit *reasonably* of any opposing inferences in *unbiased and unprejudiced minds.* There is an element of confusion in the rule thus stated and an *argumentum ad hominem* which enables the court applying the rule to easily dispose of cases on the ground that those differing did not possess the unbiased and unprejudiced mind. But this apparently easy avenue of escape for one who had the ultimate disposition of a controverted question failed or reduced itself to absurdity when the tribunal of last resort divided upon the question, as in *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 224, 80 N. W. 1020; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 131 N. W. 826; and other cases. A decision under the rule stated does not decide the case, but merely decides our moral and mental superiority over those who differ with us as to the probative effect or proper inferences to be drawn from facts.

When one person or tribunal decides upon given evidence that it contains nothing either by way of direct proof or logical inference to support a stated conclusion, and another undertakes to review and reverse that decision, the latter

must point out the error and show the items of direct proof or logical inference which have been overlooked or undervalued by the first decision. But no such thing is necessary if the rule is so modified as to permit the reviewer to bolster up his own argument by determining that he was intelligent, unbiased, and unprejudiced, while all who differed with him lacked those high qualities. But the decision in *Powell v. Ashland I. & S. Co., supra,* did not stop here. It undertakes to add to the existing rule, and declares that, while we must give the evidence and the logical inference therefrom this effect most favorable to the person nonsuited and consequently against the decision, we must give the decision such weight that it cannot be disturbed unless against the clear preponderance of the evidence. This is impossible, contradictory, and most confusing. No one can reconcile these two rules. The preponderance of evidence has been defined, and it has been often said that that evidence preponderates which is the most credible and convincing. *Parker v. Hull,* 71 Wis. 368, 37 N. W. 351. I do not attach great weight to judicial definitions except as they affect the particular case. It is not a judicial function to define the meaning of a word as applied to all cases, and judicial definitions from this viewpoint are more frequently wrong than right, except when they perform the idle office of copying from the current dictionaries. But the words "preponderance of evidence" naturally and ordinarily refer to a question of fact, *i. e.* the difference in convincing power between two opposed probative tendencies. If there could be any doubt on this, it must be dissipated by the further language of the court in *Powell v. Ashland I. & S. Co., supra:*

"The opportunities which a trial court has for determining such questions are superior to those possessed by the appellate court, and on that ground are entitled to considerable weight, and, where the question is doubtful, to controlling weight."

This language is applicable only to questions of fact arising in the court below, and the expression, "where the question is doubtful to controlling weight," is in direct contradiction of that part of the rule as stated in the same case, which declares that "unless the proof of contributory negligence is so clear and decisive as to leave no room for unbiased and impartial minds to come to any other conclusion, . . . the proper inference to be drawn must be determined by the jury." Upon this background of confusion in thought and language this court has attempted for some years to sketch a plan of procedure to guide professional men, inferior courts, and itself. It has succeeded in proving under this rule, in *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020, that either three of the judges of this court, or else two of the judges of this court plus the circuit judge and the jury, did not possess unbiased or unprejudiced minds. Very many conflicting and confused statements of this alleged rule are thereafter to be found in the reports. In *Turtenwald v. Wis. Lakes I. & C. Co.* 121 Wis. 65, 98 N. W. 948, where the ruling of the circuit court directing a verdict for defendant was reversed, the rule was softened down as follows:

"Ordinarily a trial judge in deciding whether the evidence in any reasonable view of it will support a verdict in favor of the plaintiff has some advantages over an appellate court, and that such circumstance, in doubtful cases, is entitled to considerable weight upon appeal."

There will also be found the aggressive and militant form of the rule, as in *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 391, 119 N. W. 102, where it is said:

"A conclusion of a trial court, respecting sufficiency of evidence as to any fact in issue to present a jury question, should not be disturbed unless it appears from the record to be clearly wrong, giving due weight to the superior advantages which such court has *for discovering the truth.*"

This alleged rule has been stated in many ways, differing not only in form but in substance, and sometimes without distinction of the question presented. When the trial court has decided that there is evidence sufficient to take the case or the question to the jury and the jury has decided affirmatively or negatively on that question, and it is sought to review the said ruling of the trial court in this court, the double-headed rule declared in *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573, could be logically applied, leaving out the personal element; because in that case the rule which entitles one to a jury trial upon questions of fact and entitles him to have the evidence submitted to the jury, if, viewed in its aspect most favorable to him, there is any basis for a jury finding, and the rule that the decision of the circuit court is entitled to weight, would coincide and tend in the same direction; but where the question for review in this court is a ruling of the trial court taking the case away from the jury on account of insufficiency of evidence, then the double rule in question is contradictory and inconsistent. Add to this confusion that several justices of this court seem to have a different way of stating the rule, and we have a deplorable situation. See *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 131 N. W. 826, dissenting opinion; *Collier v. Salem,* 146 Wis. 106, 130 N. W. 877; *Lines v. Milwaukee,* 147 Wis. 546, 133 N. W. 592; *Collins v. Janesville,* 117 Wis. 415, 423, 425, 94 N. W. 309; *McCune v. Badger,* 126 Wis. 186, 189, 105 N. W. 667; *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 114 N. W. 841. "Considerable reliance," *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 188, 120 N. W. 839; *Fitzpatrick v. Lake Superior T. & T. R. Co.* 142 Wis. 65, 70, 124 N. W. 1054.

But the further "reasonable doubt" addition to this rule applied in the present case goes beyond anything heretofore approved by this court, although there is a suggestion of it in a dissenting opinion by Mr. Justice MARSHALL in *Sparks*

v. Wis. Cent. R. Co. 139 Wis. 108, 120 N. W. 858. The confusion that has crept into the courts on this subject is well displayed in the decision in *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513, and perhaps it was well to say, as was said in *Meyst v. Frederickson,* 146 Wis. 85, 130 N. W. 960: "This rule is not an arbitrary one, but applies with varying strength according to circumstances." This is equivalent to saying this rule is not a rule. True, there is no rule without its exceptions, but an exception is not a question of varying strength. The instant case must have been one for the application of the rule with great strength. When the jury and the circuit judge both pass on the amount of the damages suffered in a personal injury case, this rule in favor of the decision of the circuit court seems to lose its force altogether, and this court often undertakes to disagree with the court below, yet there must in nearly all such cases be a reasonable doubt with reference to the amount of damages actually sustained. *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777; *Koepp v. Nat. E. & S. Co., ante,* p. 302, 139 N. W. 179.

If this were a rule of property or a question subject to the maxim *stare decisis,* it might be considered rash at this late day to suggest a correction, and in such case we would be obliged to call upon the legislature for relief. But that branch of the government is hardly able to give us relief from the infirmity displayed by the alleged rules. Neither can it be claimed that a decision by the supreme court that confusion is clear will have the desired effect. The situation seems to call for a new application of the "rule of reason" to a much beclouded situation.

I am authorized to say Mr. Justice KERWIN concurs in this dissent.

LOWE, Appellant, vs. RING, Respondent.

December 12, 1912—January 7, 1913.

Action: Dismissal for want of prosecution: Discretion.

1. It is the legislative policy of this state that a plaintiff is under obligation to bring his action to trial and not permit it to unduly slumber.
2. In this case, but little effort having been made by the plaintiff to bring the case to trial during a period of five years or more after the cause had been remitted from this court to the trial court, and but a small portion, if any, of the delay having been occasioned by defendant, and very little excuse for the delay being shown, the dismissal of the action for want of prosecution was not an abuse of discretion on the part of the trial court.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.*

S. M. Marsh, for the respondent.

KERWIN, J. The court below dismissed this action for want of prosecution, and this appeal is from the judgment of dismissal. The action was commenced in 1897, three times tried in circuit court, and three times heard in this court. 106 Wis. 647, 82 N. W. 571; 115 Wis. 575, 92 N. W. 238; and 123 Wis. 370, 101 N. W. 698. The record was remitted from this court to the lower court in April, 1905, since which time little has been done by way of pressing the case for disposal.

It appears that in September, 1905, a reference was ordered, but no referee named, and none has been agreed upon, although it appears that some negotiations were had looking to an agreement upon a referee. Since the case was remitted in 1905 up to the time motion was made to dismiss, little effort has been made by appellant to bring the case to trial, and but a very small portion of the delay, if any, was occasioned by respondent. True, it is argued that the parties had

failed to agree upon a referee. But it does not appear that the appellant was at all diligent in endeavoring to obtain an agreement. And during the greater part of the time from September, 1905, up to the time motion was made to dismiss, a period of upwards of five years, no diligence whatever had been used to speed the case.

True, appellant's counsel seeks to excuse the delay to some extent, but at best the excusable period of delay is very short and would not exceed a few months, while the case has been permitted to slumber since the order of reference, about five years, during which time some witnesses have died. It is said that the evidence of the deceased witnesses has been taken on former trials. The use of such evidence on another trial might not be as efficient to the ends of justice as the evidence of the witnesses taken in open court before a jury. It is also claimed by appellant that respondent failed to use diligence in speeding the case. This can hardly be said to furnish an excuse for appellant's delay for so long a period of time. In fact practically nothing was done by appellant in the way of speeding the case from September, 1905, to January, 1910.

Appellant insists that it was as much the duty of respondent as appellant to bring the case to trial, and moreover that respondent has waived the right to insist on a dismissal. It is the legislative policy of this state that a plaintiff is under obligation to bring his action to trial and not permit it to unduly slumber, and we fail to find any warrant in the record for holding that the respondent waived the right to insist on dismissal for want of prosecution. We shall not attempt to review the conflicting claims of the parties respecting delays and attempted excuses for delays. Very little excuse has been shown for the long delay from 1905 to 1911, the time motion to dismiss was made. Upon the facts presented the case seems to be one involving in a large measure the exercise of a sound discretion on the part of the court below, and this court has held in a late case somewhat similar in facts

that such discretion will not be disturbed except in case of clear abuse. *Smith v. Carter,* 141 Wis. 181, 122 N. W. 1035.

After a careful reading of the record we are unable to say that the court below abused its discretion in dismissing the action.

By the Court.—The judgment is affirmed.

VINJE, J., took no part.

HUSSA BREWING COMPANY, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

December 13, 1912—January 7, 1913.

Carriers: Loss of goods by fire after arrival: Limiting liability: "Legal holidays" include Sunday: Reasonable time made definite by contract.

1. In a bill of lading, limiting to that of warehouseman only the carrier's liability for loss caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of arrival of the property at destination, the term "legal holidays" included Sunday.
2. Where the law gives a reasonable time within which to do an act, the parties to a contract may, at least within limits, make that time fixed and definite.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *William G. Wheeler,* attorney, and *George H. Gordon* and *Edward M. Smart,* of counsel. They contended that the bill of lading simply says that *after* forty-eight hours after notice the carrier's liability shall be that of warehouseman only. This does not amount to an agreement to hold as carrier for such full forty-eight hours, regardless of the lapse of a reasonable time meanwhile. It is simply an agreement between

the parties that the lapse of forty-eight hours shall be clusively a reasonable time, and thereafter the liability be that of warehouseman only. The clause is one of li tion as to reasonable time, and not a grant. Sunday is "legal holiday," according to natural signification or mon acceptance. *A. G. Spalding & Bros. v. Bernhard* Wis. 368, 372, 44 N. W. 643; secs. 1684, 2577, S (1898); secs. 1675, 1678—15, Stats. (Supp. 1906). being so naturally included, the court should, in a case this, adopt the rule that the inclusion of one term in the tract implies the exclusion of the other. The parties ha expressly excluded legal holidays, it implies that they did intend to exclude Sundays.

For the respondent the cause was submitted on the b of *Bunge & Bosshard.*

TIMLIN, J. Where (as in this case) goods had b shipped under a bill of lading providing that "the carrier . of any of the property herein described shall be liable any loss thereof or damage thereto except as hereina provided. . . . For loss, damage, or delay caused by fire curring after forty-eight hours (exclusive of legal holida after notice of arrival of the property at destination . has been duly sent or given, the carrier's liability shall that of warehouseman only;" and where notice of the rival of the property at destination had been duly given Friday, July 1, 1910, at 3 o'clock p. m., and the goods w destroyed by fire about 1 o'clock a. m. on July 5, 1910, w out negligence on the part of the carrier, the latter is lia to one who is consignor, consignee, and owner for their val Where the law gives a reasonable time within which to an act, the parties to a contract may, at least within lim make that time fixed and definite. The word "holiday" such contract includes Sunday as well as the Fourth of Ju made a holiday by statute.

By the Court.—Judgment affirmed.

WAGNER, Respondent, vs. BUTTLES, imp., Appellant.

December 13, 1912—January 7, 1913.

Master and servant: Contract of hiring: Guaranty of payment: Liability, when terminated: New hiring: Partnership: Landlord and tenant: Letting on shares: Construction of contract.

1. Where the owner of a farm, to induce a farm hand to work for the tenant, engaged to see that his wages were paid, and such farm hand, having the option to terminate his contract of employment at the end of any month, voluntarily quit work after a few months and was paid in full, his contract and the liability of the landlord upon the guaranty were thereby terminated; and the fact that he returned to work some eight months afterward, at the request of the tenant and with the knowledge of the landlord, did not revive such liability.
2. The fact that nothing was said as to wages at the time of such return, while it might warrant a finding either that it was understood and intended that the servant should receive the same wages as before or that he was to be paid *quantum meruit*, could not alter the fact that he then went to work under a new contract; and the landlord not having participated in the making of the new contract, no promise on his part to continue the guaranty could be implied.
3. A partnership was not created between the owner of a farm and one to whom he let the same on shares, although the contract contained provisions for the joint purchase and ownership of live stock for use on the farm, a sharing of certain other expenses, an advisory supervision of the farm work by the owner, and joint ownership of the produce of the farm until sale or division; especially where it was expressly stipulated in the contract that it should not be construed as constituting a partnership and that neither party should have power to contract debts on behalf of the other.
4. To constitute one a partner in an enterprise he must share in the profits as such and not as compensation for services or for the use of the property.
5. Where a farm is let in consideration of a share of the crops, there is no division of profits as such, since the tenant's share may represent a loss to him and the landlord is not bound to make good any portion of said loss.
6. In construing a contract for working a farm on shares, the intention of the parties as to what their relations should be between themselves should govern when possible.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This action was brought to recover wages alleged to have been earned between June 16, 1908, and October 3, 1910, the balance sued for being $361. The defendant *Buttles* was the owner of a large farm, and on April 1, 1907, entered into a three-year contract or lease with his codefendant by which the latter agreed to work the farm on shares. The plaintiff was actually employed by the defendant Rand, but claimed that he entered the employment under an agreement on the part of the defendant *Buttles* to see that his wages were paid. The defendant Rand did not appear in the action. The case was submitted to the jury on a general verdict. The court instructed the jury that unless *Buttles* agreed to pay *Wagner's* wages before the latter entered upon his employment and *Wagner* relied on such promise and extended credit both to Rand and *Buttles,* there could be no recovery against *Buttles.* The court said:

"You must be satisfied upon this issue, by a fair preponderance of the evidence, that before *Mr. Wagner* entered into the service *Mr. Buttles* promised to pay or in effect see that his wages were paid for the work which he was performing on the farm. If you are satisfied by a fair preponderance of the evidence that *Mr. Buttles* did so promise, and he relied upon it and performed work in reliance upon that promise, then he is entitled to recover the amount asked for. If you are not so satisfied you should find for the defendant."

The jury returned a verdict for the plaintiff for the amount claimed, and from a judgment entered on such verdict the defendant appeals.

The cause was submitted for the appellant on the brief of *George H. Gordon,* and for the respondent on that of *A. E. Bleekman.*

BARNES, J. Prior to April 1, 1907, plaintiff worked for a tenant of the defendant *Buttles.* Rand was about to suc-

ceed such tenant on April 1st, and requested plaintiff to continue in his employ. Plaintiff testified that he declined the offer of employment until *Buttles* went to him and said: "You are acquainted with the stock on the place, and I want you to stay here if you will and I will see that everything is all right." This is the only conversation that ever took place between plaintiff and *Buttles* in reference to employment. After it occurred, according to plaintiff's evidence, he went to Rand and made a contract of hire with him, by which Rand agreed to pay him $35 per month during the so-called eight summer months and $25 per month for the four winter months. This month-to-month contract of hire was terminated by the plaintiff on September 1, 1907, when he voluntarily quit work. His wages were paid in full by Rand. Some eight and one-half months thereafter Rand met the plaintiff and said to him: "We want you to come back there and work for us again." Pursuant to this request plaintiff returned on June 16, 1908. *Buttles* was not present when Rand requested plaintiff to return to work, and so far as the evidence disclosed he knew nothing whatever about the transaction which led to the second employment. Plaintiff continued to work until October 3, 1910, when Rand quit the farm owing him $361. Plaintiff never received any money from *Buttles* for his work and never made any demand on him for money until this action was commenced, although he knew that Rand and *Buttles* were settling up before Rand left the farm.

Either party had the right to terminate the original contract of employment at the end of any month. We can see no escape from the conclusion that the plaintiff effectually terminated it when he quit work October 1, 1907. If he commenced work under that contract on the strength of *Buttles's* promise, surely that promise ceased to have any force or effect when plaintiff quit work and was paid all that was due him under his contract of hire. If Rand and the plaint-

iff saw fit to enter into a new contract nearly nine months after the first one terminated, we are at a loss to see how *Buttles* can be held responsible to the plaintiff simply because he agreed to assume responsibility for the first contract. It is true that *Buttles* knew plaintiff had returned to work on the farm, but it is also true that under the lease or contract by which Rand went into possession of the farm he specifically agreed to pay all labor employed in working it. If one person agreed with a merchant to become responsible for a bill of goods furnished to another while he was performing a certain contract, it would hardly be contended that he thereby became liable for a second bill of goods furnished to the party while he was performing another contract subsequently made. The illustration is quite analogous to the situation in this case. It does not appear that anything was said about wages when plaintiff returned to work, but this does not alter the fact that he went to work under a new contract. The circumstances were such that a jury might be warranted in finding that the parties understood and intended that plaintiff was to receive the same wages which he had formerly been paid. If not, plaintiff could recover on *quantum meruit*. But in the absence of any participation by *Buttles* in the making of this second contract, we do not see how any promise on his part to continue his guaranty can be implied. We think the record is barren of any evidence to connect *Buttles* with this second contract. It appears from the evidence of the plaintiff that *Buttles* was anxious to have him continue his work because of his acquaintance with the stock, Rand being a new man on the farm. After Rand became familiar with conditions there was no apparent reason why *Buttles* should prefer plaintiff to any other employee.

Some slight evidence was offered on the trial tending to show that, as to the plaintiff, *Buttles* and Rand held themselves out as partners, and plaintiff argues that they are liable to him as such even though they were not partners *inter se*.

It is evident from the manner in which the court submitted the case to the jury that it considered the evidence wholly insufficient to sustain a finding that as to the plaintiff the defendants held themselves out as copartners. The jury was told that unless they found that before plaintiff entered the service *Buttles* promised to pay his wages they must return a verdict for the defendant. We think the circuit judge was correct in concluding that there was no evidence tending to show that the defendants held themselves out to the plaintiff as partners.

But one point remains to be considered. If the defendants were partners *inter se* the judgment is right, although recovery was not allowed on such ground. The agreement between the defendants falls within a class which the courts have found it difficult to classify. Reasons can be urged why the contract does not create the relation of landlord and tenant as that relation is defined by the common law. Reasons can also be urged to show that the relation of master and servant did not exist, and why the parties were not partners, and why the defendant Rand was not a cropper. Reasons can also be advanced in support of a contention that the contract created each and every of the relations above specified. The New York court has christened this class of agreements "special contracts" (*Taylor v. Bradley,* 39 N. Y. 129), and our own court and some others have said that they partake of the nature of "an adventure" which entitles the person taking the farm to participate in the profits derivable therefrom. *James v. James, ante,* p. 78, 137 N. W. 1094, and cases cited. Some courts hold that agreements of the kind here involved make the parties thereto copartners. *Lewis v. Wilkins,* 62 N. C. 303; *Thornton v. Barber,* 48 App. Div. 298, 62 N. Y. Supp. 527; *Leavitt v. Windsor L. & I. Co.* 54 Fed. 439; *Bank of Overton v. Thompson,* 118 Fed. 798. The North Carolina decision was not followed in the subsequent case of *Day v. Stevens,* 88 N. C. 83. Between the dates on which the

two cases were decided a statute was passed which in part at least accounts for the change. Cases holding the contrary doctrine, decided by foreign jurisdictions, are: *Cedarberg v. Guernsey,* 12 S. Dak. 77, 80 N. W. 159; *Smith v. Schultz,* 89 Cal. 526, 26 Pac. 1087; *Brown v. Jaquette,* 94 Pa. St. 113; *Williams v. Rogers,* 110 Mich. 418, 68 N. W. 240; *Randall v. Ditch,* 123 Iowa, 582, 99 N. W. 190; *Blue v. Leathers,* 15 Ill. 31; *Shrum v. Simpson,* 155 Ind. 160, 57 N. E. 708; *State v. Saunders,* 52 S. C. 580, 30 S. E. 616; *Gurr v. Martin,* 73 Ga. 528; *Romero v. Dalton,* 2 Ariz. 210, 11 Pac. 863; and *Taylor v. Bradley,* 39 N. Y. 129. The terms of the contracts involved vary considerably in these cases. Perhaps the one coming nearest to the contract before us is that passed upon in the South Dakota case. However, the contracts are much alike in their main features. In each of them the landowner agrees to permit another to work his land and the landowner receives as compensation for the use of the land a part of the crops raised thereon, and the party working the farm receives the balance as compensation for his services.

Turning to the decisions in our own court: In *Strain v. Gardner,* 61 Wis. 174, 21 N. W. 35, it was held that a contract whereby Strain leased her farm to Gardner and was to be paid one third of the crops for its use created the relation of landlord and tenant. Substantially the same kind of an agreement was held to create the relation of landlord and tenant in *Foley v. Southwestern L. Co.* 94 Wis. 329, 68 N. W. 994.

In *Rowlands v. Voechting,* 115 Wis. 352, 91 N. W. 990, the contract was designated a lease, and it was stipulated therein that in lieu of rent the landowner should reserve one half of the income of the farm and the products raised thereon, including proceeds derived from the sale of milk, butter, eggs, etc., and that the tenant should render quarterly accounts of receipts and disbursements and furnish receipts showing the payment of disbursements, and that all expenses except farm

labor were to be borne equally by the parties. This contract was held to create the relation of landlord and tenant. In support of this conclusion it was pointed out that the words "lease, demise, and let" were used in the document; that the parties thereto were designated "lessor" and "lessee;" that with certain exceptions the premises were placed in the exclusive possession of the lessee for a definite term; that he had power to raise such crops as he pleased; and, finally, that the lessee was to discharge his rent not by rendering one half the crops *in specie* to the landlord, but by paying one half the income received by him from the sale of the produce of the farm.

The contract in the case before us is a much more elaborate affair than was the one involved in the *Rowlands Case*. The two instruments are similar in these particulars: The premises in each instance were "leased, demised, and let;" the parties were designated "lessor" and "lessee;" the leasing was for a definite term; certain expenses were to be borne equally by the parties; the lessees in each case were required to pay the farm labor employed; in each case the personal property leased was to be returned; each lessee agreed to pay road taxes, and each agreed to keep the buildings in a good state of repair.

The principal points of difference between the two leases are the following: In the present case the lessor reserved the right to erect additional buildings on the farm and the lessee agreed to haul the material therefor free of charge. Any additional live stock purchased for the farm was to be jointly paid for and jointly owned. In case it was necessary to buy any provender for the live stock, each agreed to pay one half the cost. Each agreed to pay one half the cost of threshing and corn shredding and of filling the silo, except the lessee was to pay the labor cost entering into these items. The lessor reserved the right to exercise a general supervision in the conduct and carrying on of the farm, by conferring and advising with the lessee. All the produce raised on the farm was to be

the joint property of the parties and could not be so out the consent of the lessor. The money derived f sale of said produce was to be divided equally. I termination of the lease the joint property was not of, it was to be equally divided; and, finally, it was st that the agreement should in no manner be construed partnership between the parties, and that neither part have any authority to contract any indebtedness for o half of the other.

The real essential points of difference between leases are four in number. In the instant case th (1) a provision for the joint purchase and ownership stock for use on the farm; (2) the produce raised ther to be the joint property of the parties and could not be of without the consent of *Buttles;* (3) *Buttles* reser right to exercise a general supervision in the conduct rying on of the farm, by conferring and advising with and (4) the parties agreed that their contract should construed as constituting a copartnership, and that party could contract debts on behalf of the other.

This latter provision is significant, though not con in determining the relationship of the parties. *Spau Stubbings,* 86 Wis. 255, 56 N. W. 469. In so far a tion is important in determining the question, it is cl the parties did not intend to form a copartnership.

The latest definition by this court of what constitutes nership is found in *Langley v. Sanborn,* 135 Wis. 17 114 N. W. 787, wherein it is said that wherever we l community of interest in the profits of the business *as p* we have a copartnership. The court pertinently rema the definition is elusive and difficult of application, l wherever it appears that one should share in the profit enterprise as *compensation* for the services, property, portunity furnished by him in aid of the business, no p ship results. He must share in profits as such and

compensation for services or property, or the parties do not become partners. *Hoile v. York,* 27 Wis. 209; *Ford v. Smith,* 27 Wis. 261; *Nicholaus v. Thielges,* 50 Wis. 491, 7 N. W. 341; *Sohns v. Sloteman,* 85 Wis. 113, 55 N. W. 158. There are a multitude of decisions by other courts which hold that an agreement to contribute labor or property in consideration of receiving a part of the profits of some enterprise does not create a partnership where such profits are paid as compensation for the thing contributed. Reference is made to a few of them: *Denny v. Cabot,* 6 Met. (47 Mass.) 82; *Nantasket Beach S. Co. v. Shea,* 182 Mass. 147, 65 N. E. 57; *Estate of Smythe v. Evans,* 209 Ill. 376, 70 N. E. 906; *Thornton v. McDonald,* 108 Ga. 3, 33 S. E. 680; *Hanthorn v. Quinn,* 42 Oreg. 1, 69 Pac. 817; *Garrett v. Republican P. Co.* 61 Neb. 541, 85 N. W. 537; *Austin, N. & Co. v. Neil,* 62 N. J. Law, 462, 41 Atl. 834; *Rider v. Hammell,* 63 Kan. 733, 66 Pac. 1026; *McDonnell v. Battle House Co.* 67 Ala. 90.

We already have three decisions of this court which hold that an agreement to turn over a part of the crop raised in payment of rent is not inconsistent with the relation of landlord and tenant and does not create a copartnership. In other words, the landowner receives as compensation for the use of his farm part of the proceeds thereof. This is logical. The thing divided is not necessarily profits at all as far as the tenant is concerned. His share may have cost him more than it is worth, and the landlord is not called upon to make good any portion of the loss.

Notwithstanding the provision in reference to supervision and joint ownership, there is little to indicate that the money or property received by *Buttles* was not received as compensation for the use of the farm and personal property leased to his codefendant. We see no reason why a tenant may not agree with his landlord to pay as rent a portion of the produce raised and agree to give him title and the right to dispose of

such share and also extend to him the right to give advice, where he has placed in the possession of the tenant not only real estate but also personal property which would depreciate rapidly if not properly cared for. It is difficult to see how the thing to be divided was profits. It is seldom that a contract is prepared that more clearly shows an intent on the part of the parties not to create a partnership, and a further intent that whatever produce or money the lessor received because of what was raised on the farm was given him as compensation for its use.

It is not inherently impossible for the parties to make such an agreement as was made here and still have a situation where the share received by *Buttles* was received as compensation for the use of the farm. This being so, the intention of the parties as to what their relations should be between themselves should govern. 1 Parsons, Cont. (9th ed.) 158. The question of partnership is an important one, and we have not had the benefit of any argument upon it by counsel. It has been discussed because it was thought when the case was under consideration that the question was fairly involved and was a reasonably close one.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

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ADVERSE POSSESSION.

An action of ejectment brought by the true owner of land against tenants occupying the same operates to interrupt the running of the statute of limitations (in this case sec. 4211, Stats. 1898) in favor of the landlord, when he is in possession only through such tenants, although he is not a party to the suit. To that extent there is privity between tenant and landlord. *Illinois Steel Co. v. Kohnke,* 410

ADVERSE WITNESS. See WITNESSES.

AFFIDAVITS. See DISCOVERY, 1–3.

AMBIGUITIES. See EVIDENCE, 4, 5. LIBEL AND SLANDER, 3, 9. MUNICIPAL CORPORATIONS, 8, 34. STATUTES, 4.

AMENDMENT of pleadings. See APPEAL, 8. MASTER AND SERVANT, 17. PLEADING, 6.

ANIMALS.

1. Under sec. 1620, Stats., if dogs of different owners unite in killing, wounding, or worrying sheep, each owner is liable for all the damage so done. *Johnson v. Lewis,* 615
2. Where, in an action for the killing, wounding, and worrying of sheep there was evidence tending to show that the damage was done by a small dog belonging to defendant and a larger one owned by another person, and the jury, coming in with an incomplete special verdict, informed the court that they were having difficulty with the question of separating the damage done by each dog, they should have been told that that question was not before them; and it was error to submit to them a new set of questions in order to make it easier for them to separate such damage, whereby they were led and encouraged to find nonliability of defendant upon a ground inconsistent with the rule above stated. *Ibid.*

ANNEXATION of territory by city. See APPEAL, 19. SCHOOLS AND SCHOOL DISTRICTS.

ANSWER. See ACTION, 3.

ANTICIPATION of injury. See ELECTRICITY. MASTER AND SERVANT. 5, 6, 20.

APPEAL AND ERROR.

Decisions reviewable: Appealable orders. See EXECUTORS AND ADMINISTRATORS, 6.

1. This court acquires no jurisdiction to consider the merits of an order appealed from unless it was appealable; hence the question of appealability is always involved in a consideration of the merits. *Wisconsin Real Estate Co. v. Milwaukee,* 198
2. In an action to restrain the collection of a special assessment, an order requiring the plaintiff to pay to the city treasurer the amount of the assessment as a condition of maintaining the action is appealable under subd. 3, sec. 3069, Stats. (1898), as an order granting a provisional remedy. *Ibid.*
3. An order of the circuit court affirming an order of the civil court of Milwaukee county overruling a demurrer, is appealable under subd. 3, sec. 3069, Stats. *Danielson v. Garage E. Mfg. Co.* 492

Right to review: Persons entitled. See CRIMINAL LAW. EXECUTORS AND ADMINISTRATORS, 6.

Exceptions.

4. A general exception to the entire charge to the jury, much of which is concededly correct, is not available on appeal; nor is a general exception to the refusal to give requested instructions, some of which at least should not have been given. *Elwell v. Bosshard,* 46

Printed case and brief: Costs.

5. Appellant's printed case and brief in this case being of unnecessary length and failing to comply with the rules of this court, no costs for the printing thereof are allowed. *Loehr v. Dickson,* 469

6. A brief, "the great part of which can only be characterized as buffoonery," is stricken from the files and no costs allowed for the printing thereof. *Ibid.*

Review: Questions considered. See EXECUTION, 1.

7. An appeal from a judgment does not bring up for review in the supreme court orders made after judgment; hence, upon such an appeal, errors alleged in the denial of a new trial after judgment cannot be considered. *International Text Book Co. v. Samer,* 570

8. Although no answer was interposed to a second cause of action stated in the complaint, yet the plaintiff's right to recover thereon having been litigated on the trial by both parties as if an issue had been joined, the case will be treated on appeal as though the answer had been amended accordingly. *Morehouse v. Voight,* 580

Same: Presumptions. See DAMAGES, 7.

Same: Findings, when disturbed. See TRIAL, 6.

9. Errors will not be regarded on appeal, fatally prejudicial, unless, from the whole record, it appears with reasonable clearness, that had they not occurred the result might, probably, have been materially more favorable to the complaining party. *Koepp v. National Enameling & S. Co.* 302

10. Where the trial court acts upon a motion to set a verdict aside as excessive, passing upon both the question of whether it is characterized by passion or prejudice and whether, without such element, it is too large in view of the evidence, the result will not be disturbed on appeal unless manifestly wrong. *Ibid.*

11. Because of the superior opportunity of the trial judge for reaching a right conclusion, his decision as to whether there is a jury question for solution will not be disturbed on appeal unless manifestly wrong. *Sloan v. Chicago, M. & St. P. R. Co.* 645

Same: Affirmance and reversal: Material and immaterial errors. See ANIMALS, 2. APPEAL, 9–11, 24, 25. CONTINUANCE. CORPORATIONS, 15. CRIMINAL LAW. DAMAGES, 4. DESCENT AND DISTRIBUTION, 1. FRAUD, 3. INJUNCTION, 5, 8. INSTRUCTIONS TO JURY, 1. MASTER AND SERVANT, 15–17, 32, 33. MUNICIPAL CORPORATIONS, 23, 24. NEGLIGENCE, 4. REPLEVIN, 3. TRIAL, 1, 3, 4, 8, 9, 11. WITNESSES, 3.

12. The mere negative testimony of one witness that he did not hear the bell nor see any effort to stop the car, is not sufficient to

justify a reversal of the decision of the trial court based on positive testimony to the contrary. *Raasch v. Milwaukee E. R. & L. Co.* 170

13. Upon appeal it is not sufficient ground for setting aside a verdict that it is against the weight of evidence, where there is some credible evidence to support it and it does not appear to be perverse. *Milwaukee Trust Co. v. Milwaukee,* 224

14. Erroneous admission of evidence of an unpleaded defect against defendants' objection, and submission of the same to the jury, must be deemed to have affected a substantial right of defendants, namely, the right to know what charge of negligence is made against them in time to prepare their defense, and is therefore ground for reversal. *Brey v. Forrestal,* 245

15. A judgment will not be reversed for the erroneous admission of irrelevant evidence, or even of incompetent evidence, unless it affirmatively appears that the appellant has been prejudiced thereby. *Guse v. Power & Mining Machinery Co.* 400

16. The statement having been made in respondent's brief, and repeated without contradiction upon the oral argument, that one of the appellants (in this case a church corporation) had notified their attorney that it did not wish to prosecute the appeal and had requested that the same be dismissed so far as the church was concerned, and a fugitive verified statement to the same effect having been sent to this court by the trustees of the church, the court affirms the judgment against such appellant without extended or critical examination of the evidence. *Maede v. Broehm,* 563

17. A judgment will not be reversed because of rulings upon evidence which, even if erroneous, clearly had no substantial effect upon the verdict rendered. *International T. B. Co. v. Samer,* 570

Same: Subsequent appeals: Law of the case.

18. All mere questions of law involved in a former appeal, whether thought of and argued by counsel or not, were foreclosed by the decision of that appeal. *Lutien v. Kewaunee,* 607

19. In an action to declare invalid the proceeding by which a city annexed certain territory under the general charter law, a judgment dismissing the complaint was affirmed on a former appeal upon the ground that the right to attack such proceeding was barred by limitation under sec. 925—21, Stats.; but the trial court was authorized to permit the case to be opened upon motion based upon an amended complaint showing facts sufficient to avoid the bar of the statute. *Held,* that the question of the constitutionality of the law under which the city acted and of the ordinance of annexation was involved in the former appeal and, for the case at least, was set at rest by that decision. *Ibid.*

Determination and disposition of cause: Mandate on reversal. See EVIDENCE, 9. EXECUTORS AND ADMINISTRATORS, 3. RECEIVERS, 2.

20. In an action for personal injuries, where a judgment for plaintiff is reversed solely upon the ground that the damages awarded are excessive, this court will ordinarily name a smaller sum which the plaintiff may accept and terminate the litigation. *Depow v. Chicago & N. W. R. Co.* 109

21. But, in an action for injuries sustained through driving a team of horses against a train of cars standing at night on an unlighted railroad crossing, it appearing not only that the award of $9,500 is much too large, but also that the evidence tending to establish defendant's negligence is very uncertain and unsatisfactory, the judgment is reversed and the cause remanded for a new trial. *Ibid.*

22. Recovery upon a counterclaim is denied by the mandate in this case, there having been no finding of damages thereon in the trial court, and the record upon appeal not showing that defendant was entitled to recover. *Loehr v. Dickson,* 469

Bond or undertaking on appeal: Liability of sureties: Option to take judgment for smaller amount: Interest.

23. The sureties upon a bond or undertaking on appeal are held only according to the language of their bond. *Lehman v. Amsterdam Coffee Co.* 207

24. Where, on appeal, a judgment in plaintiff's favor for damages was reversed, and a new trial was ordered unless plaintiff should elect to take judgment for a certain smaller sum, in which case judgment for that sum was ordered to be rendered in her favor in the trial court, it cannot be said that the judgment appealed from was affirmed even in part; and the judgment thereafter entered upon plaintiff's election to take the smaller sum could not properly go against sureties who, by their undertaking on appeal, became responsible for payment of damages only in case the judgment appealed from were affirmed in whole or in part. *Ibid.*

25. The plaintiff in such case having been given the option to take judgment for a certain sum and no more, it was error to include in the judgment interest on that sum from the date of the verdict. *Ibid.*

APPEALABLE ORDERS. See APPEAL, 1–3. EXECUTORS AND ADMINISTRATORS, 6.

APPLIANCES. See MASTER AND SERVANT, 10–14.

ARGUMENTS OF COUNSEL. See TRIAL, 1.

ARMY AND NAVY.

Soldiers' Home: Governor: Official status. See EXECUTORS AND ADMINISTRATORS, 4–6.

1. The governor of the National Home for Disabled Volunteer Soldiers in Milwaukee county does not derive his appointment from the President, from any court of justice, or from any head of a federal department authorized by law to appoint to office, but is appointed by the board of managers as the local manager or governor of said Home, and is therefore not an officer of the United States. *Mallory v. Wheeler,* 136

Jurisdiction of state courts over National Home.

2. The title to the premises occupied by said National Home is not in the United States, but is vested in a corporation created by act of Congress, and the state retains its jurisdiction over the territory embraced therein. *Mallory v. Wheeler,* 136

ARSON.

1. The evidence in this case (stated in the opinion) is *held* insufficient to sustain the conviction of a person charged with burning in the nighttime the dwelling house of another. *Gerke v. State,* 495
2. In such a case the facts that defendant had for years led the industrious and exemplary life of a reliable and law-abiding citizen, and that by his honest labor he had accumulated some property, do not prove his innocence; but a reputation of that kind carries much weight, especially when the evidence of guilt is doubtful and circumstantial. *Ibid.*

ASSAULT AND BATTERY.

An award of $300 compensatory damages for an assault and battery is *held* to be sustained by the evidence. *Elwell v. Bosshard,* 46

ASSESSMENT. See MUNICIPAL CORPORATIONS, 11, 12. TAXATION, 2–5.

ASSIGNMENTS. See INSURANCE, 8–11.

ASSOCIATIONS.

Voluntary associations: Liability of members for debts.

1. Every member of a voluntary association is liable jointly and severally for the debts thereof incurred during his membership for the purpose of carrying out the objects for which the association was formed. *Vader v. Ballou,* 577
2. In an action to recover a balance due for printing done for a voluntary campaign committee, brought against a member who had acted as treasurer of the committee and had made part payment out of the funds contributed thereto, the fact that in the first instance plaintiffs had charged up the account to the chairman of the committee, who ordered the printing, was not conclusive evidence that the work was done upon the credit of the chairman or relying on him individually for payment. *Ibid.*

ASSUMPTION OF RISK. See MASTER AND SERVANT, 20, 22, 24, 25, 34, 35. TRIAL, 5.

ATTORNEY AND CLIENT. See DIVORCE. INJUNCTION, 7, 8.

AUTOMOBILES. See MUNICIPAL CORPORATIONS, 37, 38.

BILL OF LADING. See CARRIERS, 4.

BOARD OF REVIEW. See TAXATION, 2–5.

BONDS. See APPEAL, 23–25. JUDGMENT, 2, 3. MUNICIPAL CORPORATIONS, 14, 16, 17, 42, 43.

BRIDGES. See NEGLIGENCE, 10–13.

BRIEFS. See APPEAL, 5, 6.

BROKERS.

Commissions. See ACTION, 1.

In an action by a real-estate broker to recover a commission for securing a purchaser for defendant's land, testimony of the pro-

posed purchaser that he was ready, able, and willing to buy the land and to pay the entire purchase price in cash, was not incompetent on the ground that he was testifying to a conclusion and not to a fact; and such testimony, especially when uncontroverted and not impeached by anything elicited on cross-examination, was sufficient to support a verdict in accordance therewith. *Ahearn v. Borngesser*, 194

BUILDING CONTRACTS. See MECHANICS' LIENS. PRINCIPAL AND SURETY.

BURDEN OF PROOF. See EVIDENCE, 1, 2.

BURIAL. See CEMETERIES.

CARRIERS.

Transportation and delivery of goods: Connecting carriers: Negligence: Proximate cause of loss.

1. The federal statute (34 U. S. Stats. at Large, 595, ch. 3591) which gives a right of action against the initial carrier for loss or damage to property shipped from one state into another, does not take away rights of action such as theretofore existed against connecting carriers. *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, followed. *Uber v. Chicago, M. & St. P. R. Co.* 431
2. Evidence is *held* sufficient to sustain findings by the jury that defendant was negligent in giving notice of the arrival of a carload of pelts, and that such negligence was the proximate cause of the loss thereof through spoiling. *Ibid.*
3. The fact that the shipment was not routed directly to its final destination, although it may have contributed proximately to the spoiling of the pelts, did not establish contributory negligence on the part of the shippers, it appearing that there was ample time to transport the pelts without injury by the route selected if defendant had exercised proper care. *Ibid.*

Same: Limitation of liability: Loss after arrival.

4. In a bill of lading, limiting to that of warehouseman only the carrier's liability for loss caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of arrival of the property at destination, the term "legal holidays" included Sunday. *Hussa B. Co. v. Chicago & N. W. R. Co.* 666
5. Where the law gives a reasonable time within which to do an act, the parties to a contract may, at least within limits, make that time fixed and definite. *Ibid.*

CEMETERIES.

Sec. 1454, Stats., prohibiting the laying out or establishing of any cemetery grounds or the use of any grounds for burial purposes within fifteen rods of any habitable dwelling, is aimed at the grounds as a whole, and where a considerable part of the grounds which have been laid out and are about to be used for burial purposes are within such limit it is immaterial, in an action to restrain such use, that the particular grave dug by the defendants was more than fifteen rods from plaintiff's house. *Maede v. Broehm*, 563

CERTIFICATE OF CONVENIENCE AND NECESSITY. See MUNICIPAL CORPORATIONS, 16, 17.

CERTIORARI. See TAXATION, 2, 5.

CHANGE OF BENEFICIARY. See INSURANCE, 6–11.

CHANGE OF GRADE. See MUNICIPAL CORPORATIONS, 20–24.

CITATION. See EXECUTORS AND ADMINISTRATORS, 4–6.

CIVIL SERVICE. See MUNICIPAL CORPORATIONS, 10–13.

CLAIMS. See MUNICIPAL CORPORATIONS, 44–47.

CLASSIFICATION. See MUNICIPAL CORPORATIONS, 1, 2.

CLOUD ON TITLE. See VENDOR AND PURCHASER, 1, 3.

COMITY. See CORPORATIONS, 2.

COMMISSIONS. See ACTION, 1. BROKERS.

COMPLAINT. See DEEDS, 2. FRAUD, 1. PLEADING, 1.

CONDITIONS PRECEDENT. See APPEAL, 2. DAMAGES, 7. LIMITATION OF ACTIONS, 1. MORTGAGES, 2. MUNICIPAL CORPORATIONS, 27, 31, 45–47.

CONDUCT OF COUNSEL. See TRIAL, 1.

CONFLICT OF LAWS. See DESCENT AND DISTRIBUTION, 4.

CONSIDERATION. See PUBLIC LANDS, 2.

CONSOLIDATION. See ACTION.

CONSPIRACY.

Civil liability.

1. One who has knowledge that detectives in his employ or under his control propose to engage in "open or rough shadowing" of a person under surveillance, and consents thereto, cannot escape liability therefor on the plea that he did not know what the term meant. *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 537

2. A conspiracy to libel a person or to commit any other wrong to his person, reputation, or property may, when damage follows, be the subject of a civil action. *Ibid.*

3. "Open or rough shadowing," which consists in openly and publicly following and watching a person, being calculated to publish him as suspect and to bring him into public disrepute, ridicule, and contempt, is an unlawful act, and a conspiracy to do such act is actionable. *Ibid.*

4. When such open or rough shadowing is accompanied by acts of trespass such as entry into plaintiff's house and pursuing him into his attorney's office, and by threats, insults, eavesdropping, and ambiguous and uncalled-for communications with his employer, these constitute circumstances of aggravation for which the persons taking part in the conspiracy are liable. *Ibid.*

5. In such a case the evidence of the defendants as to what their purpose was in the surveillance is not conclusive on the court or jury, but the plaintiff may show by circumstantial or other evidence, and the jury may find therefrom, that the purpose was different from that claimed. *Ibid.*

6. A purpose to prevent a person from leaving the state or the city of his residence until it is determined whether or not to have him arrested, is in itself not a lawful purpose to be undertaken by private individuals. *Ibid.*

7. Surveillance for such purpose, if maliciously done, is a violation of sec. 4466*a*, Stats., and gives to the injured party a cause of action. *Ibid.*

Same: Evidence.

8. The liability of conspirators to civil damages is joint and se eral, and, when the existence of a conspiracy has been show *prima facie*, the plaintiff may give in evidence as bearing up his damages the acts and sayings of any conspirator done spoken in pursuit of the common purpose, whether that co spirator be a party or not. *Schultz v. Frankfort M., A. & P. Ins. Co.* 5

9. Such acts and sayings are evidence against other conspirator not under the rule *respondeat superior*, but under the law conspiracy, which makes each the agent and spokesman of a engaged in the unlawful enterprise. The plaintiff may, hov ever, invoke either rule for the purpose of connecting any the parties with the tort. *Ibi*

Same: Damages: Mitigation.

10. In an action for damages for a conspiracy to injure plaintiff b open and rough shadowing, defendants may show in mitig tion of damages that their intentions were good, that the act complained of were done without malice and in pursuance a supposed legal duty, or that the plaintiff's reputation was s bad that the acts of the defendants were not likely to injur him much, if at all; but such facts do not constitute a justific tion or defense. *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 53

CONSTITUTIONAL LAW.
Construction of constitutional provisions. See MUNICIPAL CO PORATIONS, 30.
Legislative powers. See CORPORATIONS, 7. MASTER AND SERVANT 23, 25.
Judicial powers. See COURTS, 1, 4.
Classification. See MUNICIPAL CORPORATIONS, 1, 2.

CONTEMPT. See INJUNCTION.

CONTINUANCE.

An application for a continuance because of inability to procur the testimony of a nonresident witness, made nearly two year after issue joined and after the cause was called for trial, wa properly denied on the ground of lack of diligence, where n attempt to take the deposition of the witness had been made *Peerless M. S. Co. v. German American Ins. Co.* 35

CONTRACTS.
Requisites and validity. See FRAUD. PUBLIC LANDS.
Illegality: Performance. See JUDGMENT, 1-5. MUNICIPAL CORPO RATIONS, 18, 19.
Construction and operation. See GUARANTY. LANDLORD AND TEN ANT. MASTER AND SERVANT, 1-3. PARTNERSHIP. PRINCIPAL AN SURETY.
Specific performance. See SPECIFIC PERFORMANCE.

CONTRIBUTORY NEGLIGENCE. See CARRIERS, 3. ELECTRICITY. MASTE AND SERVANT, 6, 20, 24, 25, 34, 35. NEGLIGENCE, 7-13. TRIAL, 12

CORPORATIONS.

Capital stock: Sale and transfer: Duty of secretary. See FRAUD, 10 12, 13. RECEIVERS, 3, 4.

1. It is not the duty of the secretary of a corporation, and he may properly refuse, to transfer stock on the books of the corpora

tion when there is a *bona fide* claim on the part of the corporation that the person seeking to have the transfer made is not and never was a stockholder, and especially when it seems reasonably certain that the corporation is right in such contention. *Holyoke v. Millmann*, 551

2. It was not the purpose of the legislature in enacting sec. 1752, Stats. (1898), to permit the secretary of a corporation to disturb the *status quo* while a contest was pending or was being carried on by rival claimants for stock. *Ibid.*

3. One who had at best an executory contract with a corporation for the purchase of stock therein, attempted to assign to another the right to purchase a part of such stock. In form he attempted to assign the stock itself, but in fact he never owned it. The assignee was apparently obnoxious to the corporation, and it never accepted him as a stockholder. *Held*, that the secretary properly refused to make a transfer on the books of the stock so attempted to be assigned. *Ibid.*

Same: Right of corporation to select members.

4. Primarily a corporation, when it offers its stock for sale, has the right to select the purchasers. *Holyoke v. Millmann*, 551

Officers and agents. See CORPORATIONS, 15, 17. DISCOVERY, 3.

Foreign corporations: Contracts: Right to hold property: Curative act.

5. Under sec. 1770*b*, Stats., the contract of a foreign corporation which has not complied with that section, affecting the personal liability of such corporation or relating to property within this state, is void only at the election of the party dealing with the corporation. Neither the corporation nor its assigns can enforce the contract against the other party; but such party may affirm or disaffirm it at his election. *Lanz-Owen & Co. v. Garage Equipment Mfg. Co.* 555

6. By subsec. 1 of sec. 1770*j*, Stats. (Laws of 1911, ch. 142), the disability of a foreign corporation, coming within the terms of the act, to hold real property within this state which it had acquired or attempted to acquire as there stated, was removed from the time the act took effect; but such removal did not relate back to the date of the deed or lease under which the corporation claimed title, nor validate such instrument from its inception. *Ibid.*

7. Subsec. 2 of said sec. 1770*j* limited to one year after the act took effect the time within which any person claiming that the legal title to real property was invalid by reason of the failure of any corporation coming within the terms of subsec. 1 to comply with sec. 1770*b* might commence an action or interpose a defense on such grounds; and such limitation, being a reasonable one, was within the power of the legislature. *Ibid.*

8. The right to commence such action or interpose such defense was not limited to a person who had contracted with the corporation. *Ibid.*

9. A "corporation coming within the terms of subsection 1" was one that had acquired or attempted to acquire legal title by deed or lease to real property in this state before complying

with sec. 1770*b*, and which thereafter complied with that section before the enactment of sec. 1770*j*. *Ibid.*

10. The words "legal title" in subsec. 2 of sec. 1770*j* refer to the same subject as do the same words in subsec. 1, namely, a legal title by deed or lease. *Ibid.*

11. Real property in this state was leased by the owner to a foreign corporation which had not complied with sec. 1770*b*, Stats., but which thereafter complied therewith before sec. 1770*j* took effect. After sec. 1770*j* took effect the corporation sued one who, it alleged, had unlawfully withheld from it the possession of the leased property. Within a year after sec. 1770*j* took effect the defense was interposed that the lease to plaintiff was invalid because given before plaintiff had complied with sec. 1770*b*. *Held*, on demurrer, that such defense was good. *Ibid.*

Same: Right to sue.

12. The right of foreign corporations to sue in the courts of this state rests upon comity, and in the absence of legislative prohibition they may maintain such actions in certain cases without having complied with sec. 1770*b*, Stats. *American Food Products Co. v. American M. Co.* 385

13. A contract between foreign corporations to exchange property of one or more for stock in another, which is neither made nor to be performed in this state and does not relate to property within the state, is not affected by sec. 1770*b*, Stats., either as to its validity or as to the right of one of such corporations to maintain an action thereon in the courts of this state. *Ibid.*

Same: Examination of officers before issue joined. See DISCOVERY, 3.

14. It is immaterial to plaintiff's right to examine an officer of the defendant corporation before issue joined, whether an action for specific performance can or cannot be maintained here upon contract to convey land in another state, where the affidavit states that the action is brought to enforce the promises and undertakings of defendant or, if specific performance be impossible, to recover damages. *American Food Products Co. v. American M. Co.* 385

15. Where the president of defendant corporation was named in the summons as an individual defendant, and a notice was given for an examination under sec. 4096, Stats., describing him as "one of the above named defendants," while the subpœna was directed to him "individually and as an officer of the corporations named," etc., service of such papers upon him was sufficient to authorize his examination as an officer of the corporation, and the irregularity, if any, should be disregarded. *Ibid.*

Same: Service of process.

16. Under subd. 13, sec. 2637, Stats. (1898), when a foreign corporation has property within this state, service of process may be made upon it by service upon an officer thereof, being within the state, and it is immaterial whether at the time of service such officer is in the state on business of the company or not. *American Food Products Co. v. American M. Co.* 385

17. The same rule applies to service of a notice of examination under sec. 4096, Stats., to enable the plaintiff to plead. *Ibid.*

COSTS.

Persons entitled.

1. It was not an abuse of discretion to award costs to a successful plaintiff in an equitable action to enforce a right of redemption from an execution sale, where no objection was made to the form of the action, and the defendant interposed an equitable counterclaim, and the case was tried before the court as an equity action, although the desired relief might have been otherwise obtained. *Falbe v. Caves,* 54

Taxation: Time limit.

2. Where the trial court orally ordered the action to be dismissed for lack of authority to sue, but the findings were not prepared or filed until some months thereafter, taxation of costs within sixty days after such filing was permitted by sec. 2894*a*, Stats. *McDonough v. M. & N. R. Co.* 69 Wis. 358, and *Milwaukee M. & B. Asso. v. Niezerowski,* 95 Wis. 129, distinguished. *Jenks v. Allen,* 625

On appeal. See APPEAL, 5, 6.

COUNTERCLAIM. See APPEAL, 22. COSTS, 1.

COURTS.

Supreme court: Superintending control over inferior courts.

1. The power of "superintending control over all inferior courts," vested in the supreme court by sec. 3, art. VII, Const., may properly be used in aid of the appellate power when, without its use, a serious miscarriage of justice may probably occur. *Jones v. Providence Washington Ins. Co.* 274
2. As a general rule, after the supreme court has fully acquired jurisdiction by appeal from a final judgment, the trial court cannot take any action affecting in any way that judgment or the exclusive power of the supreme court to deal therewith. *Ibid.*
3. Yet, after appeal and subject to the stay of proceedings imposed in aid thereof, there still remains in the circuit court a qualified jurisdiction at least, which may be called into activity by permission of the supreme court. *Ibid.*
4. In a serious exigency, where justice seems to require it and no other remedy is adequate, the supreme court may properly, by virtue of its power of superintending control, suspend the operation of the stay for the time being and authorize a motion for a new trial to be made and decided in the circuit court, even though the result may be to set aside the judgment appealed from. *Ibid.*

Same: Appellate jurisdiction. See APPEAL AND ERROR.

COVENANTS. See DEEDS, 2.

CRIMINAL LAW AND PRACTICE.

See ARSON.

One convicted of crime has not only the right to the solemn judgment of the trial court on the question whether his guilt was sufficiently proven, but upon writ of error he has the right to demand the deliberate opinion and judgment of this court upon the same question. *Gerke v. State,* 495

CROPPER. See LANDLORD AND TENANT, 4. MASTER AND SERVANT, 1. PARTNERSHIP, 1, 3.

CROSS-COMPLAINT. See MECHANICS' LIENS, 6.

CROSS-EXAMINATION. See MASTER AND SERVANT, 9, 18. REPLEVIN, 3.

CUSTOM AND USAGE. See MASTER AND SERVANT, 37, 38.

DAMAGES.

Grounds. See CONSPIRACY.

Mitigation. See CONSPIRACY, 10. MASTER AND SERVANT, 2, 3.

Measure of damages. See ASSAULT AND BATTERY. DEATH, 2, 3. MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 20–24.

1. In all inquiries relating to value, where there is no known, regular, and continuous market, such as exists in the exchanges or such as exists generally for consumption goods, a wide range of investigation is permitted and the rules governing the admission of evidence are liberal. *Milwaukee Trust Co. v. Milwaukee,* 224

2. In an action *ex delicto* based on false representations by the vendor of land to the effect that the purchaser would get title to the timber thereon, the measure of damages is the difference between the market value of the land as it was and the market value as it would have been had the representations been true. *Darlington v. J. L. Gates Land Co.* 461

3. If the action were *ex contractu* on the covenants of warranty in the conveyance, the measure of damages would be such proportion of the whole consideration paid as the value of the timber the title to which failed bore to the value of the whole tract purchased, with interest. *Ibid.*

4. Where, in such a case, the lowest measure of damages applicable to either form of action was adopted, defendant was not prejudiced by a failure to determine whether the action was in tort or upon contract. *Ibid.*

5. The question being as to the value of certain timber removed from land sold to the plaintiff, and the testimony being conflicting not only as to values but as to the kinds and quantities of timber, the jury was not bound to accept and rely solely upon the testimony of any one witness, in assessing damages, nor to make a mere computation based upon any particular testimony. *Ibid.*

6. Where the title fails to timber represented as going with land sold, and the damage to the vendee is the market value of the timber at the time of the sale, interest on such value from that time is properly allowed. *Ibid.*

Excessive damages. See APPEAL, 20, 21. EVIDENCE, 9.

7. Where the trial court requires a party in whose favor a verdict for damages has been rendered to remit a part thereof as a condition of judgment, the presumption will obtain on appeal, there being no unmistakable indication to the contrary, that the reduced sum was placed as low, in the judgment of the trial judge, as any other jury of fair men, properly instructed, would be liable to find on the same evidence. *Koepp v. National Enameling & S. Co.* 302

DEATH.

See ELECTRICITY. MASTER AND SERVANT, 7. MUNICIPAL CORPORATIONS, 45, 47. NEGLIGENCE, 10, 13. STREET RAILWAYS. TRIAL, 12, 13.

1. A recovery under secs. 4255, 4256, Stats., for the death of a person is not on behalf of his estate but for the benefit of the surviving widow, if there be one; and it is only in a case where there is a substantial period of suffering between the injury and the death that both causes of action may co-exist. *Moyer v. Oshkosh,* 586
2. In an action for death under secs. 4255, 4256, Stats., although such death resulted proximately from the negligence of a town or city as to keeping a highway in repair, the recovery is not limited to $5,000, notwithstanding that is the limit of recovery under sec. 1339 for injuries caused by defective highways. *Ibid.*
3. The amendment of sec. 4256 by ch. 581, Laws of 1907, whereby the limit of recovery in actions for death was changed from $5,000 to $10,000, is not applicable only to actions against railway companies, although entitled "An act to amend section 4256 of the statutes relating to the liability of railway companies for the death of any person." *Ibid.*
4. The law of 1907 being a general, not a private or local, law, the fact that its title is misleading and erroneous does not affect its validity. *Ibid.*

DEEDS.

Deed absolute as mortgage. See MORTGAGES, 1.

Covenant against incumbrances: Lien of special assessment: Pleading.

1. A special assessment for a street improvement in the city of Milwaukee becomes a lien upon an abutting lot when the certificate stating the amount chargeable thereto is issued to the contractor pursuant to secs. 13 and 13*a*, ch. VII, of the city charter. *Cady v. Henes,* 422
2. In an action for breach of the covenant in a warranty deed that the premises conveyed were free and clear from all incumbrances, a complaint alleging that at the time of the conveyance the premises were subject to a special assessment of a certain amount for street improvements, which had been "duly and legally levied" upon the property pursuant to the city charter, as a special improvement tax, and was "a legal and valid subsisting lien upon the real estate conveyed, . . . and was then remaining due and unpaid, and was at the time of the delivery of the said deed a lien and incumbrance by law upon said premises," sufficiently alleges these matters to permit the introduction of evidence that all the requirements prescribed in the charter to charge the land with the cost of the improvement had been complied with. *Ibid.*

DEFICIENCY JUDGMENT. See MORTGAGES, 2–4.

DEMURRER. See APPEAL, 3. PLEADING, 1–5.

DEPOSITIONS. See CONTINUANCE. CORPORATIONS, 14, 15. DISCOVERY.

DEPOSITS. See STIPULATIONS, 1.

DESCENT AND DISTRIBUTION.

1. In a proceeding to determine heirship a finding by the circuit court that one M. (who was born in slavery) was not the daughter of the decedent is *held* erroneous. *Richmond v. Taylor*, 633

2. The written acknowledgment of paternity provided for in sec. 2274, Stats. (relating to the heirship of illegitimates), need not have been made for the express purpose of establishing heirship or of complying with the statute, if it does in fact meet the statutory requirements. *Ibid.*

3. Such an acknowledgment need not be in precise, formal language, but is sufficient if it appears with reasonable clearness and certainty from the written words that the paternity of the child is acknowledged. *Ibid.*

4. The law of the domicile of the person making the acknowledgment, and not that of the domicile of the child or mother, governs the question of legitimation. *Ibid.*

5. Where, in a written application to the government for a pension, signed in the presence of a competent witness, the applicant declared a certain person to be his daughter, in such terms and under such circumstances as to exclude inadvertence or mistake, this was a sufficient acknowledgment of paternity under sec. 2274, Stats., to constitute such person his heir, assuming her to have been his illegitimate child. [Whether if she was not his child she would be entitled to inherit, not determined.] *Ibid.*

DETECTIVES. See CONSPIRACY, 1, 3–5, 7, 10.

DILIGENCE. See CONTINUANCE.

DIRECTING VERDICT. See NEGLIGENCE, 2. STREET RAILWAYS.

DISCHARGE. See MASTER AND SERVANT, 2, 3.

DISCOVERY.

Under sec. 4096, before issue joined: Affidavit. See CORPORATIONS, 14, 15, 17.

1. Where plaintiff seeks to examine the defendant under sec. 4096, Stats., before issue joined, if his affidavit shows affirmatively that he has no cause of action the examination will be denied; but the affidavit need not state facts sufficient to constitute a cause of action, nor is it even necessary that plaintiff should know that a cause of action exists. All that the statute requires is that the general nature and object of the action be stated, and that a discovery is sought in order to enable the party applying for it to plead. *American Food Products Co. v. American M. Co.* 385

2. Where the matters upon which discovery is sought to enable a party to plead are obviously within the knowledge of the party applying for the examination it will be denied; but where the

facts sought are not obviously within the knowledge of the party, and the affidavit is in compliance with the statute, examination should be permitted. *Ibid.*

3. The affidavit in this case is *held* sufficient to justify an order for the examination of the president of defendant, a foreign corporation, upon whom service had been made. *Ibid.*

4. The examination of a party under sec. 4096, Stats., is at all times under the supervision of the trial court, and the discretion of that court respecting such examination will not be interfered with except in cases of clear abuse. *Ibid.*

Under sec. 4068. See WITNESSES, 1, 3.

DISCRETION. See COSTS, 1. DISCOVERY, 4. DISMISSAL AND NONSUIT, 2. DIVORCE, 1. SPECIFIC PERFORMANCE. TRIAL, 10. WITNESSES, 2.

DISCRIMINATION. See PUBLIC UTILITIES, 3–5.

DISMISSAL AND NONSUIT.

Dismissal for want of prosecution.

1. It is the legislative policy of this state that a plaintiff is under obligation to bring his action to trial and not permit it to unduly slumber. *Lowe v. Ring,* 664

2. In this case, but little effort having been made by the plaintiff to bring the case to trial during a period of five years or more after the cause had been remitted from this court to the trial court, and but a small portion, if any, of the delay having been occasioned by defendant, and very little excuse for the delay being shown, the dismissal of the action for want of prosecution was not an abuse of discretion on the part of the trial court. *Ibid.*

DIVORCE.

Reconciliation of parties: Attorney's fees.

1. Where the parties to a divorce action settled their differences and became reconciled within two days after the summons was served and, before the papers were filed in court, the plaintiff wife directed her attorney to dismiss the suit and the husband offered to pay the attorney what his services were reasonably worth, it was an abuse of discretion to continue the action at the request of the attorney merely for the purpose of enforcing payment of attorney fees. *Szymanski v. Szymanski,* 145

2. Where in such case the services of the attorney, who had been a lawyer for but three years, consisted merely in hearing the wife's story and in drafting the summons, complaint, an affidavit, and an order to show cause, a fee of $75 offered by the husband was ample. *Ibid.*

3. It is the duty of counsel in divorce cases to promote settlement and reconciliation of parties wherever possible, even at the sacrifice of fees when necessary, and such counsel should not unnecessarily make public the domestic discords which are condoned by the settlement. *Ibid.*

DOGS. See ANIMALS.

DRAINS. See INJUNCTION. MUNICIPAL CORPORATIONS, 31.

EJECTMENT. See ADVERSE POSSESSION.

ELECTRICITY.

A boy about fourteen years old, while upon the top of a lumber pile, took hold of defendant's electric lighting wires and was killed. *Held*, upon the evidence, that the jury were warranted in finding that defendant was negligent in the use of its wires so placed and strung, and that it ought reasonably to have anticipated that some child would be injured thereby; and, there having been no contributory negligence on the part of the deceased or his parents, a recovery was properly had against the defendant, although the boy was a bare licensee or invitee upon the lumber pile. *Meyer v. Menominee & Marinette L. & T. Co.* 279

ELEVATORS. See MUNICIPAL CORPORATIONS, 35.

EQUITABLE ASSIGNMENTS. See INSURANCE, 10, 11.

EQUITY.

See COSTS, 1. DISCOVERY. DIVORCE. INJUNCTION. MECHANICS' LIENS. PUBLIC UTILITIES, 2. RECEIVERS, 1, 2. SPECIFIC PERFORMANCE.

Equity may in all cases so frame its decrees as to make them effective to do equity, and the forms of equitable relief are as various as the transactions investigated and regulated in equity. *McMillan v. Barber Asphalt Paving Co.* 48

ESTOPPEL. See MUNICIPAL CORPORATIONS, 9. REPLEVIN, 2.

EVIDENCE.

Presumptions. See DAMAGES, 7. MASTER AND SERVANT, 12. TAXATION, 3.

Burden of proof.

1. In a personal injury action the burden is upon plaintiff to show to a reasonable certainty that defendant was negligent and that such negligence was the proximate cause of the injury. *Kaszubowski v. Johnson Service Co.* 149

2. It is not sufficient in such a case to show two or more possible causes, some of which are actionable and others not, and from such evidence permit the jury to speculate as to which one occasioned the injury. *Ibid.*

Relevancy, materiality, and competency. See BROKERS. CONSPIRACY, 8–10. EVIDENCE, 3. FRAUD, 6. MASTER AND SERVANT, 8, 36, 37. MUNICIPAL CORPORATIONS, 21–24. REPLEVIN, 4.

Parol evidence affecting writings. See TAX TITLES.

3. Where plaintiff had made a contract in writing to sell a farm and certain personal property thereon to defendant, by the terms of which plaintiff had a right to retain possession until the deal was finally consummated, the testimony of defendant that after the contract was made the plaintiff told him that he might go upon the farm and look after the property and take possession of a part of it, was not incompetent on the ground that it tended to vary the terms of the writing. *Morehouse v. Voight,* 580

4. Where, upon applying a writing to the subject matter to which it relates, a latent ambiguity appears therein, parol testimony

of the facts and circumstances surrounding its execution, including conversations and negotiations between the parties, may be received to solve the ambiguity. *Hammond v. Capital City Mut. F. Ins. Co.* 62

5. A policy insured "Hammond Bros." against loss or damage by fire to "household goods"—including specifically, among other things, household furniture, family wearing apparel, family stores and supplies, watches and jewelry in use,—located in a building and occupied by assured as a hotel and saloon. It appearing that two brothers carried on a partnership business under the firm name of Hammond Bros. and had partnership property in such building, and that each had individual property therein, there was a latent ambiguity in the policy as to whose property was insured under the term "Hammond Bros.," and parol evidence was properly admitted to show that, in a conversation between one of the brothers and the agent of the insurer prior to the delivery of the policy, it was agreed and understood that the insurance should cover the individual property of each partner as well as the partnership property. *Ibid.*

Opinion evidence: Competency of experts.

6. One who has had experience with machinery of the kind in question and is familiar with conditions and practices in factories in the vicinity, is qualified to testify as to the feasibility of guarding a belt which operates such machinery, and as to his experience and observation on the subject. *Krawiecki v. Kieckhefer Box Co.* 176

Same: Weight and effect.

7. Opinions of experts as to whether plaintiff's present physical condition was caused by the injury complained of, and as to the extent of his disability, are not absolutely binding upon the court. *Depow v. Chicago & N. W. R. Co.* 109

8. The verdict of a jury founded solely upon the opinion of experts as to the cause of a condition (in this case the loss of sexual power), which condition is itself established only by the opinion of experts, has no conclusive weight even in the appellate court. *Krawiecki v. Kieckhefer Box Co.* 176

9. Such condition having been submitted to the jury as an element of damages upon evidence too vague and unsatisfactory, in the opinion of this court, to justify such submission, a judgment upon the verdict awarding plaintiff $2,000 is reversed and a new trial awarded unless plaintiff elects to remit all of the damages in excess of $1,000, which sum is deemed as low an amount as an impartial jury upon the competent evidence would award. *Ibid.*

Weight and sufficiency. See ASSAULT AND BATTERY. ASSOCIATIONS, 2. CARRIERS, 2. EVIDENCE, 7–9. FRAUD, 3, 12. MASTER AND SERVANT, 4–7, 14, 19, 29–31, 37, 38. MUNICIPAL CORPORATIONS, 24, 39. NEGLIGENCE, 8, 10. PAYMENT. REPLEVIN. STREET RAILWAYS. VENDOR AND PURCHASER, 4.

EXAMINATION.

Of adverse party before trial. See CORPORATIONS, 14, 15, 17. DISCOVERY.

Of adverse witness at trial. See WITNESSES.

EXCEPTIONS. See APPEAL, 4.
EXCESSIVE DAMAGES. See APPEAL, 20, 21. DAMAGES, 7. EVIDENCE, 9.

EXECUTION.

Sale: Redemption. See COSTS, 1. STIPULATIONS.

1. In an action to enforce a right to redeem lands from an execution sale, a defense that plaintiff had parted with his title, not sustained by any evidence, cannot be considered on appeal. *Falbe v. Caves,* 54
2. To entitle a mortgagee to redeem, under sec. 3007, Stats. (1898), from an execution sale, it is not essential that he should have been such mortgagee at the time the sale was made. [Whether one who takes a mortgage after the expiration of the year limited for redemption by the execution debtor can redeem under said section within fifteen months from the date of sale, not determined.] *Ibid.*
3. Where, when one entitled seeks to redeem land from an execution sale, the purchaser makes no objection to the papers or proofs presented, but rejects the money tendered on the ground that the offer comes too late, he thereby waives any informality or defect in such proof. *Ibid.*
4. When the money required to redeem from an execution sale is properly tendered by one who brings himself within the statute, the redemption is complete, and it is not defeated by his failure to file the evidences of his right in the office of the register of deeds as prescribed by sec. 3015, Stats. (1898); that provision being for the protection of third persons. *Ibid.*

EXECUTORS AND ADMINISTRATORS.

Appointment and removal: Administrator de bonis non: Notice: Guardians ad litem: Accounting and settlement. See PLEADING, 3.

1. The appointment of an administrator *de bonis non* under sec. 3804, Stats., to succeed a removed executor may be made without notice and without the appointment of a guardian *ad litem* for minors. *Jenks v. Allen,* 625
2. Although no guardian *ad litem* for minors was appointed at the time of the probate of the will and issuance of letters testamentary to the removed executor, such executor and his sureties, having become parties to and participated in the proceeding, waived the necessity for such appointment, and the proceeding is binding upon them, though it may be disaffirmed by the minors. *Ibid.*
3. To the end that the whole litigation in this case may be speedily closed up as to all parties interested in the estate, the defendants, the removed executor and his sureties, are permitted to have the minors for whom no guardian *ad litem* was appointed made parties to the suit, and the final account of the executor restated. *Ibid.*

Collection of estate: Citation to disclose assets: Appeal.

4. A citation to the governor of the National Home for Disabled Volunteer Soldiers, issued out of the county court of Milwau-

kee county, under the provisions of ch. 120, P. & L. Laws of 1870, as amended by ch. 471, P. & L. Laws of 1871, upon complaint of the public administrator, directing said governor to appear and submit to examination concerning the effects of a deceased inmate of the Home, is not in violation of or inconsistent with any act of Congress governing the Home. *Mallory v. Wheeler,* 136

5. Although the rules of the institution contain certain provisions relative to the disposition of the effects of inmates dying therein, there is nothing in such citation to indicate that any federal statute or rule will be violated. *Ibid.*

6. An order of the county court requiring the governor of the National Home to submit to examination, at the instance of the public administrator, concerning the estate of a deceased inmate, is appealable; and the governor, being subject to certain penalties for failure to comply therewith, is a "person aggrieved" by such order and may appeal therefrom. *Ibid.*

EXPERT TESTIMONY. See EVIDENCE, 6–9.

FALSE REPRESENTATIONS. See FRAUD, 1, 3, 6, 8, 10–13.

FARMING ON SHARES. See LANDLORD AND TENANT, 4. MASTER AND SERVANT, 1. PARTNERSHIP, 1, 3.

FELLOW-SERVANTS. See TRIAL, 12.

FINDINGS OF FACT. See INJUNCTION, 4, 5.

FIRE INSURANCE. See INSURANCE, 1.

FORECLOSURE. See MECHANICS' LIENS. MORTGAGES, 2–4. VENDOR AND PURCHASER, 4–6.

FOREIGN CORPORATIONS. See CORPORATIONS, 5–15. DISCOVERY, 3.

FRANCHISES. See MUNICIPAL CORPORATIONS, 4–9.

FRAUD.

Sale or exchange of lands: Misrepresentation. See DAMAGES, 2. VENDOR AND PURCHASER, 4.

1. A complaint alleging that plaintiff and defendant made an agreement for exchange of lands, whereby plaintiff was to assume and pay the taxes on certain lots which defendant was to convey to him; that as an inducement for the exchange defendant represented that such taxes would not exceed $200, although, as he knew or had reason to know, they amounted to $458.83; that in reliance upon such representations plaintiff entered into the agreement, and by reason thereof sustained damage in the sum of $266.83, states a good cause of action. *Woteshek v. Neuman,* 365

2. It is not necessary in all cases of fraud that the deception should have been by means of any trick or artifice. A mere falsehood relative to a material fact is often sufficient. *Ibid.*

3. Although plaintiff's testimony in this case, corroborated by another witness, that defendant made the false representations alleged was contradicted by defendant and some members of his family who heard at least a part of the conversation, this court cannot say that a verdict for the plaintiff was not supported by such clear and convincing evidence as the law requires in proof of fraud. *Ibid.*

4. There being nothing suspicious or improbable in defendant's statement that the taxes would not exceed $200, plaintiff had a right to rely thereon and was not bound to examine the city records to ascertain the truth. *Ibid.*

5. Where a third person acts in collusion with an agent to defraud his principal, the latter is not chargeable with notice of information which the agent receives in the course of and relative to such collusive transaction; and this rule is especially applicable where the agent is requested not to communicate such knowledge to his principal. *Ibid.*

6. In an action based on alleged false statements by defendant as to the amount of the taxes on his lots, whereby plaintiff was induced to make an exchange and to assume payment of such taxes, evidence as to the relative value of the properties exchanged was admissible. *Ibid.*

7. In actions for fraud great latitude in the introduction of evidence is allowed. *Ibid.*

8. It is sufficient to constitute actionable fraud that the false representations made were a material inducement toward entering into the contract and they need not have been the sole cause or inducement. Language used in *Shaw v. Gilbert*, 111 Wis. 165, explained. *Darlington v. J. L. Gates Land Co.* 461

[9. Whether or not misrepresentations upon a sale of land, amounting only to constructive fraud, merge in the covenants for title in the deed, so that an action *ex delicto* will not thereafter lie, not decided.] *Ibid.*

Sale of corporate stock: False representations: Rescission: Waiver.

10. A false representation, made by the vendor to induce the purchase of corporate stock, that he had arranged with the other stockholders that upon the sale being made the purchaser would be elected treasurer and business manager of the corporation and would receive a certain weekly salary, was a material representation and, if the purchaser relied thereon in making the purchase, constituted ground for a rescission of the contract. *Schwab v. Esbenshade*, 513

11. Upon the evidence in this case, the questions whether such representation was made and whether the purchaser relied thereon were for the jury. *Ibid.*

12. Negotiations had by the purchaser with other stockholders upon the same subject, prior to the purchase, do not indisputably show that he relied wholly upon their statements and not upon the representations of the vendor. *Ibid.*

13. The fact that the purchaser of the stock, after being elected to a different position and at a less salary than that promised him, with full knowledge of the facts remained with the corporation for two weeks performing the duties of the position and accepting the compensation voted him, did not, as a matter of law, constitute a ratification of the contract and a waiver of his right to rescind, where it appeared that he at once protested to the vendor, refused to accept the result, offered to return the stock, demanded back his money, and told the vendor he would remain and do the work assigned only for the time being and because he was without other employment; but upon the whole evidence the question of waiver was one for the jury. *Ibid.*

FRAUDS, STATUTE OF. See PUBLIC LANDS, 3.

FRAUDULENT REPRESENTATIONS. See FRAUD, 1, 3, 6, 8, 10–13.

GIFTS. See INSURANCE, 8.

GROSS NEGLIGENCE. See STREET RAILWAYS.

GUARANTY.

1. Where the owner of a farm, to induce a farm hand to work for the tenant, engaged to see that his wages were paid, and such farm hand, having the option to terminate his contract of employment at the end of any month, voluntarily quit work after a few months and was paid in full, his contract and the liability of the landlord upon the guaranty were thereby terminated; and the fact that he returned to work some eight months afterward, at the request of the tenant and with the knowledge of the landlord, did not revive such liability. *Wagner v. Buttles*, 668

2. The fact that nothing was said as to wages at the time of such return, while it might warrant a finding either that it was understood and intended that the servant should receive the same wages as before or that he was to be paid *quantum meruit*, could not alter the fact that he then went to work under a new contract; and the landlord not having participated in the making of the new contract, no promise on his part to continue the guaranty could be implied. *Ibid.*

GUARDIAN AD LITEM. See EXECUTORS AND ADMINISTRATORS, 1–3.

HEIRS. See DESCENT AND DISTRIBUTION. WILLS, 1–4.

HOLIDAYS. See CARRIERS, 4. PLEADING, 4.

HOMESTEAD. See PUBLIC LANDS.

IMPEACHMENT. See WITNESSES, 1.

IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 14–32. TAXATION, 4.

INCOMPETENT SERVANT. See MASTER AND SERVANT, 33.

INCUMBRANCES. See DEEDS.

INFANTS. See ELECTRICITY. EXECUTORS AND ADMINISTRATORS, 1–3. MASTER AND SERVANT, 6.

INJUNCTION.

See APPEAL, 2. MUNICIPAL CORPORATIONS, 42, 43. PUBLIC UTILITIES, 2.

On whom binding: Violation and punishment: Contempt proceedings: Attorneys' fees.

1. A town supervisor who, after service upon him of an order restraining the taking of any steps toward the construction of a drainage ditch, with another person having knowledge of the injunction, resorted to a subterfuge whereby the latter dug the ditch under arrangement with a landowner who was to pay him therefor and in return receive a rebate of the drainage tax levied against his land, were properly convicted of contempt of court for violation of the injunction. *Stollenwerk v. Klevenow*, 355

2. Where an injunctional order was directed against certain defendants as the board of supervisors of a town, it is no de-

fense in a proceeding for contempt that in doing the prohibited acts they were not acting as a town board but as agents of the state, exercising police power. *Ibid.*

3. An injunctional order restraining certain defendants, as the board of supervisors of a town, and all persons acting under or by virtue of their authority, from proceeding with the construction of a drainage ditch, was binding not only on such defendants but on all persons having notice of it. *Ibid.*

4. Acts alleged to be a violation of an injunctional order are not punishable under secs. 3477, 3489, 3490, Stats. (1898), unless they were calculated to or actually did defeat, impede, or prejudice the rights or remedies of a party to an action; and the court should so determine and adjudge before imposing any fine, and should also determine and adjudge whether or not actual loss resulted to any party, so that proper disposition may be made of the fine imposed. *Ibid.*

5. Failure of the trial court to find these essential facts in express terms is not prejudicial error since the enactment of sec. 3072*m*, Stats. (Laws of 1909, ch. 192), if the record affirmatively shows that the misconduct found was in fact calculated to impede or prejudice the rights of a party and that such party suffered loss in consequence thereof. *Ibid.*

6. Where an action was commenced by the owners of lands at the lower end of a proposed drainage ditch, primarily to prevent the collection of a tax for benefits where damage rather than benefits would result, and to prevent the flooding of their lands, the construction of a small part only of the ditch above them, in violation of an injunctional order, was calculated to defeat, impede, and prejudice their rights, even though actual damage was not thereby done to their lands; and such facts appearing in the record sustain the imposition of a penalty upon the guilty persons. *Ibid.*

7. In such case it was the duty of the plaintiffs to bring to the attention of the court the fact that its order was being set at defiance, and to employ attorneys for that purpose and, where defendants contested the proceeding and sought a writ of prohibition from the supreme court, to instruct their attorneys to resist that application; and it was proper to impose upon the guilty parties the payment of attorneys' fees so incurred. *Ibid.*

8. The fact that in such case the money was ordered paid to the attorneys instead of to the parties, was at most an irregularity without prejudice, and does not call for a reversal. *Ibid.*

9. *Emerson v. Huss*, 127 Wis. 215, distinguished. *Ibid.*

INSTRUCTIONS TO JURY.

General rules. See ANIMALS, 2.

Admissions. See TRIAL, 3.

Damages by change of grade of street. See MUNICIPAL CORPORATIONS, 24.

Intent. See TRIAL, 4.

Master and servant: Defective appliances.

1. Where, in connection with a question of the special verdict as to whether a certain appliance was safe, the court charged

that to hold it defective the jury must find not only the defect but that the employer had reasonable ground to apprehend that an injury might result therefrom to an employee, the error was not prejudicial to defendant, because the charge was so inapplicable to the narrow question submitted that it could not have affected the answer, and because in any event it was favorable to defendant. *Guse v. Power & Mining Machinery Co.* 400

[2. Whether the meaning and scope of such question could properly be enlarged by instruction so as to cover both the physical condition of the appliance and the negligence of the defendant, not determined.] *Ibid.*

Same: Assumption of risk. See MASTER AND SERVANT, 15, 34, 35.

Witnesses: Credibility. See MUNICIPAL CORPORATIONS, 24.

INSURANCE.

FIRE.

Ambiguity in policy: Individual and partnership property. See EVIDENCE, 5.

Ownership of property: Loss payable to trustee: Mortgage.

1. Where a fire insurance policy provided that the loss if any should be payable to a certain person, "trustee, as his interest may appear," the insurer was chargeable with knowledge of the character of the trust; and where such trustee was the grantee named in an ordinary trust deed executed by the insured to secure payment of its corporate bonds, that deed was in legal effect a mortgage for the purposes of the insurance, and did not make the trustee the owner of the property or render the policy void on the ground that the insured was not the owner. *Peerless M. S. Co. v. German American Ins. Co.* 352

LIFE.

Mutual benefit societies: Who may be beneficiary: "Mother."

2. A relief association has power to designate the class from which beneficiaries may be selected in harmony with the statutes under which it is organized. *Jones v. Mangan,* 215

3. The constitution of a firemen relief association, organized under secs. 1987, 1988, Stats. (Supp. 1906), for the declared purpose of giving relief to the families of deceased members, provided for payment to the beneficiary named in the membership certificate, "provided that such beneficiary be either widow, child or children, mother or father, sister or brother, niece or nephew, of such deceased member;" and that in case no beneficiary should have been named the relief money should be paid "to his heirs in the following order:" widow, child, mother, father, sisters, brothers, nieces, nephews. *Held,* that the stepmother of a member was his "mother" within the meaning of the clause first quoted, and might properly be named as the beneficiary where he resided in and was a member of her family. *Ibid.*

4. The word "mother" need not be construed as having the same meaning in both clauses of the constitution above quoted. *Ibid.*

[5. Whether a mother by affinity, if not named as beneficiary, could take under the designation of "heirs" in the second clause, or whether the word "heirs" was there used to indicate those only

who could take under the statutes of distribution, is not determined.] *Ibid.*

Same: Change of beneficiary: Assignment.

6. With certain recognized exceptions, a member of a mutual benefit association who wishes to change the beneficiary named in his certificate must do so in the manner required by the certificate and the rules of the association. *Faubel v. Eckhart*, 155

7. The association may waive compliance with such requirements by issuing a new certificate naming the substituted beneficiary, or by some equivalent act; but it does not waive compliance by interpleading contesting claimants and paying the money into court. *Ibid.*

8. Where no beneficiary is named in the certificate and the fund is payable to the estate of the insured, he may make an effectual gift thereof, or transfer the same for value, without complying with such requirements, at least where there is no express regulation forbidding it or avoiding the certificate upon such transfer. *Ibid.*

9. In so far as beneficiaries of the fund are named in the certificate, the insured has no title, ownership, or property which he can transfer by assignment. He has a mere power of appointment of a beneficiary during his lifetime, and in that power the beneficiary has no vested interest. *Ibid.*

10. Although the insured may be equitably bound by a contract to exercise his power of appointment and change the beneficiaries, yet if he fails to execute that power equity cannot regard it as done, since to do so would nullify the rule that a change of beneficiary must be made conformably to the regulations of the association. *Ibid.*

11. Where, however, a certificate was payable in part to named beneficiaries and in part to the estate of the insured, and he contracted for a valuable consideration to change it and have it made payable to his minor children, but died without having carried his agreement into effect, such contract amounted to an equitable assignment of that portion of the fund which was payable to his estate, and the children were entitled to the same as against his executor. *Ibid.*

INTENT. See TRIAL, 4.

INTEREST. See APPEAL, 25. DAMAGES, 3, 6.

INTERPLEADER. See INSURANCE, 7.

INTESTATE PROPERTY. See WILLS, 5, 8, 9.

JOINDER OF CAUSES OF ACTION. See ACTION, 1. MECHANICS' LIENS, 5. PLEADING, 2. PRINCIPAL AND SURETY, 2.

JOINDER OF PARTIES. See MECHANICS' LIENS, 3, 5.

JOINT SCHOOL DISTRICTS. See SCHOOLS AND SCHOOL DISTRICTS.

JUDGMENT.

On trial of issues. See MECHANICS' LIENS, 8.

Same: Form. See EQUITY.

Same: Deficiency judgment. See MORTGAGES, 2–4.

Conclusiveness of adjudication: Persons concluded.

1. Where, in an action to restrain a city from entering into a paving contract with a certain company because the latter had bought off the opposition of one of the aldermen, the company was not made a party, but its counsel, under a general retainer from it and at its expense, participated with the counsel for the city in the trial, defending in the name of the city but for the company, a judgment in favor of the plaintiff was binding upon the company as well as upon the city. *McMillan v. Barber Asphalt Paving Co.* 48

2. A preliminary injunction in such action was dissolved and defendant had judgment. Pending an appeal the contract was entered into and was fully performed by the paving company. The appeal resulted in a decision holding the contract illegal and in a final judgment for plaintiff enjoining its execution, relating back to the time when the action was begun. *Held*, that the paving company had performed the contract at its peril, and that the illegality thereof, established by said judgment, might thereafter be taken advantage of by the plaintiff in an action to annul a special improvement bond issued to the company against his property. *Ibid.*

3. It appearing that the improvement bond had been sold to an innocent purchaser, so that the equitable remedy asked for could not be granted, judgment was properly rendered against the defendant paving company for the present worth of the bond. *Ibid.*

4. As to the plaintiff, the paving company was a wrongdoer, placing improvements upon his property against his will, and had no equitable right to compensation. *Ibid.*

5. Where a court declares a contract illegal and enjoins its execution, no rights against the party in whose favor the decree is made can be founded on an execution of that contract, unless the parties, before or after such execution, take such steps as are equivalent to the making of a new contract upon a new and lawful consideration. *Ibid.*

Same: Subjects concluded. See APPEAL, 18, 19.

6. A judgment is as conclusive as to minor questions which would have turned the result either way according to their determination, even though they were only inferentially presented, as it is upon the major or ultimate proposition involved. *Lutien v. Kewaunee,* 607

Vacating judgment. See MORTGAGES, 4.

Presumptions supporting judgment. See MASTER AND SERVANT, 13.

When trial court may take action affecting judgment after appeal. See COURTS.

Affirmance or reversal on appeal. See APPEAL, 9–25.

Same: Option to take judgment for smaller sum. See APPEAL, 20, 21, 25.

JURISDICTION. See APPEAL, 1. ARMY AND NAVY, 2. COURTS. MORTGAGES, 3. PUBLIC UTILITIES, 2.

JURISDICTIONAL ERROR. See TAXATION, 2, 5.

Right to trial by jury. See MECHANICS' LIENS, 7.

Qualification of jurors: Alderman, in action by city.

In an action by a city for violation of an ordinance, wher was no dispute as to the facts and the matter at issue on the validity and construction of the ordinance, de was not prejudiced by the fact that, against his object alderman of the city served on the jury. *Oshkosh v. bell,*

JUSTIFICATION. See CONSPIRACY, 10.

LANDLORD AND TENANT.

Rent: Untenantable premises.

1. In order to be released from payment of rent, under sec. Stats. (Supp. 1906: Laws of 1903, ch. 306), the lessee mu render possession of the leased premises. *Acme Groun Co. v. Werner,*
2. But under a lease providing, without reference to surre possession, that "while the demised premises are untena caused by fire, rent shall cease for such period," no re payable for the period of untenantability so caused though the lessee retained possession.
3. The premises become "untenantable," within the mean such a lease, when by the fire they are rendered abs unfit for the beneficial uses for which they were leased.

Working farm on shares. See MASTER AND SERVANT, 1. P SHIP, 1, 3.

4. In construing a contract for working a farm on shares, tention of the parties as to what their relations should tween themselves should govern when possible. *Wag Buttles,*

LAW OF THE CASE. See APPEAL, 18, 19.

LEGAL HOLIDAYS. See CARRIERS, 4. PLEADING, 3.

LEGISLATIVE POWERS. See CORPORATIONS, 7. MASTER AND S 23, 25.

LEGITIMACY. See DESCENT AND DISTRIBUTION, 2–5.

LIBEL AND SLANDER.

Words and acts actionable and liability therefor. See CONS 2, 3.

1. One who delivers a libelous article to a newspaper for p tion, with knowledge of what it contains, is responsi the publication thereof. *Arnold v. Ingram,*
2. To render an alleged libelous publication actionable, the d tory words must refer to some ascertained or ascertainab son, and that person must be the plaintiff. If they are general statements or comments, reflecting on no particu dividual, no averment or innuendo can make them defam
3. In libel, words are to be understood according to their pla natural import, and where there is no ambiguity in th guage its meaning is for the court to determine.

4. The court also determines whether the case was one affording a qualified privilege or the right of fair comment and criticism. *Ibid.*

Privileged communications and malice therein. See LIBEL AND SLANDER, 4.

5. A publication in the nature of an appeal by one elector to others to overthrow a ruling political clique and all who adhere to it, which imputes to its candidates no crime and employs toward them no degrading or insulting epithets, but denounces them in extravagant language as unfit for office, unworthy of public confidence, and derelict in their duties, does not go beyond the bounds of fair comment and criticism and is privileged. *Arnold v. Ingram,* 438

6. Thus, a statement in such a publication, describing plaintiff as a candidate for whom a self-respecting man could not vote, will not support a recovery in libel. *Ibid.*

7. Where the most specific and serious accusations made in the alleged libelous publication against plaintiff, a candidate for office, are found by the jury to be true, and others, found to be untrue, are in the nature of conclusions or argumentative inferences as to his fitness for office, the protection of privilege must be accorded to the whole. *Ibid.*

8. The qualified privilege to discuss the relative demerits of a candidate for office is broader than the mere right of fair comment and criticism applicable to a book, a play, or other similar thing offered to the public. *Ibid.*

9. The question of malice is for the jury; also the question of the meaning of the alleged libel when the words used are ambiguous or fairly susceptible of a libelous meaning, the question being as to how they were understood by the persons to whom they were originally published. *Ibid.*

10. Defendant is entitled to have the alleged libel considered as a whole and not in isolated passages. *Ibid.*

11. When a *prima facie* case of privilege has been made out by proof that the publication charged as libelous was made from a sense of public duty and with an honest belief in its truth, it then devolves upon the plaintiff to prove actual malice by some facts tending to show a malicious or guilty motive,—failing which, he cannot recover. *Ibid.*

Same: Excessive publication.

12. Although a newspaper article would be actionable but for the qualified privilege of discussing plaintiff's fitness for a county office, any excessive publication arising from the fact that the newspaper had some circulation outside the county is merely incidental and, in the absence of malice, gives no right of action. *Arnold v. Ingram,* 438

LICENSEE. See ELECTRICITY.

LICENSES. See MUNICIPAL CORPORATIONS, 33–35.

LIENS. See DEEDS. MECHANICS' LIENS.

LIFE INSURANCE. See INSURANCE, 2–11.

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. CORPORATIONS, 7, 8.

1. A mere irregularity in the manner of serving the notice which, under sec. 4222, Stats., must be given as a condition precedent to the right to maintain an action for injury to the person, may be waived. *Maurer v. Northwestern Iron Co.* 172
2. Where defendant received, without objection, a notice of injury which, though sufficient, was not served in the manner required by the statute, and acted thereon, assuring the plaintiff that no further notice was necessary, the irregularity in service was waived. *Ibid.*

MACHINERY. See EVIDENCE, 6. MASTER AND SERVANT, 4–20.

MALICE. See LIBEL AND SLANDER, 9, 11.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 13. OFFICERS, 1. PARTIES.

1. *Mandamus* is a proper remedy where a person has been unlawfully removed from office, regardless of the place having been filled before commencement of the proceedings. *State ex rel. Hayden v. Arnold,* 19
2. The *mandamus* remedy, in exceptional cases, may or may not be used, in the discretion of the court. There is no absolute rule as to use of such remedy to obtain possession of an office, except, it is not proper in case of a claimant having no *prima facie* title against one in possession holding by right, at least *de facto.* *Ibid.*
3. In harmony with the liberal spirit of the Code, the use of *mandamus,* in general, should be favored where permissible at all, as the most expeditious mode of vindicating the right. *Ibid.*

MARKETABLE TITLE. See VENDOR AND PURCHASER, 1–3.

MARKET VALUE. See DAMAGES, 2, 5, 6. MUNICIPAL CORPORATIONS, 20, 23. TAXATION, 5.

MASTER AND SERVANT.

The relation: Farming on shares: Damages.

1. Under a contract whereby plaintiff was to work defendant's farm for one year and was to be paid for his services by a share of the crops and of the increase of the stock, which provided that the parties should jointly occupy the dwelling house and share certain household expenses, that plaintiff should work out the road tax, should leave certain amounts of cut stove wood on the premises for defendant's use, and should pay the expense of stallion service, and which gave plaintiff the right to control certain matters as to raising crops and stock, materially affecting the probable results of the year's farming, the relationship of the parties was not strictly confined to that of master and servant, but they were to a certain extent engaged in a joint adventure; and upon a breach by the defendant, preventing plaintiff from completing the cultivation and harvesting

of the crop, plaintiff's damages were properly measured by the value of his share of the crops and of the increase of the stock at the time of such breach. *James v. James,* 78

Wrongful discharge: Measure of damages.

2. Where one hired for a given term is wrongfully discharged his right to recover is limited to his actual loss, which is *prima facie* the stipulated wages which he was prevented from earning; but he is bound to use reasonable efforts to secure other employment, and the damages are to be reduced by what he earned, or by the exercise of reasonable diligence might have earned, during the period. *Gauf v. Milwaukee Athletic Club,* 333

3. Such mitigation of damages, to be available to defendant, must be pleaded. It is not enough to plead merely that plaintiff did not make any effort to obtain work after his discharge, but it must also be alleged that he might have obtained work by the exercise of reasonable diligence, unless the circumstances are such that the latter fact must be presumed. *Ibid.*

Master's liability for injuries to servant: Machinery.

4. In an action for an injury to an employee working at a machine for trimming steel springs, caused by a piece of steel striking his eye, the evidence (stated in the opinion) is *held* to sustain findings by the jury to the effect that the piece of steel was caused to be thrown from the floor by the fall, from the framework of said machine, of a heavy knife which had been negligently placed on the machine by defendant's foreman. *Zuwodnicek v. Higgins Spring & Axle Co.* 118

5. In an action for injuries sustained by an employee in a knit-goods factory, whose hand was caught by the teeth on a revolving cylinder in a "mixing picker" as he was attempting to remove clogging material from a spout through which the product of the machine was blown into another room, it is *held,* upon the evidence, that it was a question for the jury whether the plaintiff, considering his age, intelligence, and experience, ought in the exercise of ordinary care to have understood and appreciated the danger attending the performance of such duty. *Covelli v. Cooper Underwear Co.* 130

6. In an action for injury to a boy under fifteen years of age, employed in defendant's candy factory, whose hand was caught between the rolls of a candy machine, the evidence is *held* to show, contrary to findings by the jury, that the boy was fully informed of the danger and that there was no negligence on the part of the defendant in failing to instruct and warn him. *Budny v. American Candy Co.* 261

Same: Unguarded shafting, belts, etc. See EVIDENCE, 6. MASTER AND SERVANT, 36–38.

7. In an action to recover for the death of an employee in defendant's sawmill, the evidence is *held* to sustain findings by the jury that the deceased was injured by coming in contact with a pulley and belt which he was engaged in shifting, and that it was practical to securely guard said belt and pulley. *Graves v. Rib Lake Lumber Co.* 99

8. A question asked of a witness for defendant as to what the practice was among "reasonably careful" millmen as to guarding

of such a shaft and pulley, was incompetent, because it left the witness to decide what millmen were "reasonably careful." If proper at all, the question should have been as to the practice among sawmill men generally, or the great mass of sawmill men. *Ibid.*

9. Where on his direct examination a witness was asked only whether it was practical to guard such a shaft and belt without impairing its efficiency, a ruling excluding on his cross-examination the question whether he knew of any mill in Wisconsin where a similar shaft and pulley was guarded was, though somewhat technical, strictly correct. *Ibid.*

Same: Defective appliances. See INSTRUCTIONS TO JURY, 1. TRIAL, 5.

10. In an action for personal injuries caused by the breaking of an S-hook in raising a heavy sheet of metal, the testimony being conflicting as to whether the prior breaking of similar hooks had been under the same or under different circumstances and as to whether the hook in question was in its proper place at the time of the accident, these were questions for the jury. *Guse v. Power & Mining Machinery Co.* 400

11. Under such circumstances the breaking of the hook was a fact from which the jury might infer that it was defective or insufficient. *Ibid.*

12. Standing alone, the breaking of the hook would not raise a presumption of negligence; but when this was supplemented by evidence that hooks of the same kind and make had frequently broken or bent under similar weights, that defendant's employees had been subjected to such danger for a considerable length of time, that such weakness in the hooks in all probability came to the knowledge of the defendant's superintendent, that the hooks were improperly made, and that there were indications of crystallization of the steel at the place of fracture, there was sufficient evidence to go to the jury on the question whether defendant was negligent in furnishing such defective appliance. *Ibid.*

13. Defendant not having requested the submission in the special verdict of a question covering its negligence in furnishing such defective hook, that question must be considered settled in the affirmative by the judgment in plaintiff's favor. *Ibid.*

14. In an action for injuries caused by the breaking of an S-hook used in raising a heavy sheet of metal, evidence as to the tensile strength of the iron in such hook is of little value, because where the force is applied in a different manner and direction from that employed in determining the tensile strength, the tenacity varies without any consistent or constant proportion to such tensile strength. *Ibid.*

Same: Boiler explosion.

15. In an action for injuries sustained by an employee through the explosion of a steam boiler, no defect in the design or construction of the boiler was alleged, but in connection with this question of the special verdict, "Was the boiler in question negligently kept by defendants in a dangerous and unsafe condition?" the court charged the jury in effect that they should answer in the affirmative if satisfied from the evidence that the boiler was so kept either by reason of the construction and maintenance of the fire flue therein or by reason of a globe

valve thereon being closed. *Held* error, because under such charge the jury might have found defendant negligent solely upon the ground of improper construction of the fire flue—a matter not within the issues. *Brey v. Forrestal,* 245

16. Such error was not cured by the jury's finding, as a separate ground of negligence, failure to warn plaintiff of the likelihood of the boiler exploding by reason of its dangerous condition, since such finding relates back to and is inseparably connected with the question of defective construction of the fire flue. *Ibid.*

17. Where a complaint for injuries resulting from the explosion of a steam boiler charges certain specific defects in the boiler, but not defective construction of the fire flue, the admission of evidence, against objection and without amendment of the complaint, of such defect in the fire flue and submission of the same to the jury was error, unless the objection was afterwards withdrawn or waived. *Ibid.*

18. Where plaintiff, after a ruling by the court excluding evidence of such unpleaded defect, introduced expert testimony as to the construction of the fire flue and its collapse inward, expressly for the purpose of showing why the witness reached the conclusion that the explosion was due to excessive steam pressure, defendants had the right to rest upon the assurance that such testimony was offered and received for the sole purpose stated, and to cross-examine fully thereon without opening the door to testimony upon the general subject of the safe construction of such flue. *Ibid.*

Same: Explosion of gas oven.

19. Upon evidence tending to show, among other things, that in a gas enameling oven an equipment of pipes and flues to the outer air would have increased the draft and have removed any undue accumulation of gaseous products, the jury were warranted in finding that the defective and dangerous condition of the oven, due to lack of such equipment, was the proximate cause of the death of plaintiff's intestate. *McNear v. Mitchell-Lewis Motor Co.* 286

20. Whether the deceased knew and appreciated, or ought to have known and appreciated, the danger incident to operating the oven in such condition and in the manner in which it was operated, and hence assumed the risk; whether defendant was negligent in failing to instruct or warn him as to such danger; and whether he was guilty of contributory negligence in bringing a lighted lantern near to the opening in the oven, were also, upon all the evidence in the case, questions for the jury. *Ibid.*

Same: Places to work. See NEGLIGENCE, 2, 3.

Same: Scaffolding.

21. If a scaffolding to be used by a servant is erected by him according to plans dictated by the master, the contrivance is furnished for such use within sec. 1636—81, Stats. (Supp. 1906: Laws of 1901, ch. 257). *Koepp v. National E. & S. Co.* 302

22. Where the creation of a contrivance for use in a structural operation, involves use of expert knowledge, the master, in directing the manner of construction by his servant for the latter's use, is responsible for the special knowledge ordinarily

devoted to such matters, and in case of the servant performing the work and using the contrivance, not possessing such knowledge, that has a bearing, and may have controlling weight, on the question of assumption of the risk. *Ibid.*

23. Whether sec. 1636—81 of the Statutes creates absolute duty and nonperformance is not excused by exercise of ordinary care in respect to the matter, depends upon legislative intent, not legislative power. *Ibid.*

24. The rule that a statute, adopted from another state, after having been there construed by its highest court, must be presumed to have been taken as construed, applies to sec. 1636—81, Stats., first enacted in New York and construed therein as not abrogating the defense of contributory negligence or assumption of the risk, but rendering the duty of the master, incapable of being delegated and unaffected by ordinary care or caution or discretion in selecting employees or furnishing material for the creation of the particular appliance. *Ibid.*

25. The intent of the statute to make the master an insurer of the safety of his employees in respect to the particular matter, except in case of their own efficient assumption of the risk of contributory negligence, is within constitutional limitations. *Ibid.*

26. The language of the statute as to "repairing" includes any work of restoration to a former more perfect condition. *Ibid.*

27. The words "scaffolding" and "mechanical contrivance" include any contrivance made of parts erected or used for support in or about the particular kinds of work mentioned in the statute. *Ibid.*

28. The rule of *ejusdem generis* does not apply to the words of sec. 1636—81, Stats. Each word in the series descriptive of work and of contrivance, stands by itself unrestricted by any preceding or following word, and is to be read so broadly, within reason, as to afford full relief for the condition sought to be remedied. *Ibid.*

Same: Warning servant. See MASTER AND SERVANT, 6, 16, 20.

29. In an action for injury sustained by an employee in defendant's stone-crushing plant through the tipping over of a heavy flywheel which he was helping to move, it is *held* that the fall of the wheel could not have been caused, as claimed, by a slight convexity of its thirteen-inch rim and a slight unevenness of the concrete floor on which it stood. Defendant was therefore not negligent in failing to warn plaintiff of those conditions, and a nonsuit was properly granted. *Kimball v. Universal Crushed Stone Co.* 114

30. It was a question for the jury, upon the evidence, whether the master was negligent in failing to warn the plaintiff of the danger complained of and which caused the injury, and the trial court having refused to submit that question to the jury, the special verdict as found is not sufficient in law to sustain a judgment against the defendant. *Covelli v. Cooper Underwear Co.* 130

31. A master cannot be held liable for an injury to his servant on the ground that he was negligent in not instructing or warning the servant as to a danger incident to the employment, unless

he knew or ought to have known that such instruction or warning was necessary, *i. e.* that the servant was excusably ignorant of the risk. *Ibid.*

32. Where the question whether defendant was guilty of a want of ordinary care in failing to warn plaintiff of a certain danger was submitted in a special verdict, it was not error to refuse to submit a separate question as to whether defendant ought to have known that plaintiff needed such warning; because defendant could not have been guilty of actionable negligence in failing to give the warning unless he knew or ought to have known that plaintiff needed it. *Tosty v. Morgan Co.* 601

Same: Fellow-servants. See TRIAL, 12.

Same: Incompetent servant.

33. There being evidence of defendant's negligence sufficient to support a verdict for plaintiff without considering the question of the incompetence of defendant's servant who made the hook in question, errors assigned on the latter branch of the case may be disregarded. *Guse v. Power & Mining Machinery Co.* 400

Same: Assumption of risk. See MASTER AND SERVANT, 20, 22, 24, 25. TRIAL, 5.

34. Where there is evidence which would support a finding of assumption of risk as distinguished from active contributory negligence and the submission in a special verdict of a separate question on the subject is requested, such question should be submitted or a specific instruction should be given in connection with the general question as to contributory negligence so that the jury will understand that assumption of risk is included therein. *Tosty v. Morgan Co.* 601

35. The instructions given in this case are *held* not to have informed the jury with sufficient fulness that both forms of contributory negligence were included in the general question submitted. *Ibid.*

Same: Contributory negligence. See MASTER AND SERVANT, 6, 20, 24, 25, 34, 35. TRIAL, 12.

Same: Actions: Evidence. See EVIDENCE, 6. MASTER AND SERVANT, 18, 36–38.

36. In an action for personal injuries caused by the breaking of an unguarded belt, a question propounded by defendant to its foreman as to whether any factory inspector or other official had suggested that the belt ought to be guarded, was properly excluded in the absence of any evidence that the attention of such inspectors or other officials had ever been called to the belt or to the conditions under which the machinery was operated. *Krawiecki v. Kieckhefer Box Co.* 176

37. Evidence considered and *held* insufficient to establish as a matter of law that there was no custom in wood-working factories of guarding belts under the conditions and circumstances existing in this case. *Ibid.*

38. Evidence as to the practice in other factories with reference to guarding belts used to operate similar machinery was competent as bearing upon the question whether defendant exercised ordinary care in determining whether or not the belt in question ought to have been guarded. *Ibid.*

MAXIMS.
Respondeat superior, 537, 547.
Stare decisis, 663.

MEASURE OF DAMAGES. See ASSAULT AND BATTERY. DAMAGES, 1–6. DEATH, 2, 3. MASTER AND SERVANT, 1–3. MUNICIPAL CORPORATIONS, 20–24.

MECHANICS' LIENS.

Right to lien: Subcontractors. See PRINCIPAL AND SURETY, 2.

Enforcement: Foreclosure: Equitable rules.

1. Actions for the enforcement of mechanics' liens are equitable in character, and the procedure therein and the relief to be granted are governed by the general rules of practice in courts of equity, except as modified by statute, and are not restricted or limited to the statutory regulations expressly provided. *Warren Webster & Co. v. Beaumont Hotel Co.* 1
2. The rights of the parties in such actions are to be enforced according to equitable remedies and the provisions of the statutes on the subject, whether they are plaintiffs or defendants. *Ibid.*

Same: Parties.

3. Under the equitable rule as to parties, declared by sec. 2603, Stats. (1898), sureties upon the bonds of separate contractors, which are conditioned for the payment of all bills for materials and labor contracted to be furnished by their principals, may properly be joined as parties defendant, together with the owner and such principals and other lien claimants, in an action by subcontractors to enforce a lien upon the premises improved. *Warren Webster & Co. v. Beaumont Hotel Co.* 1
4. In such action the primary right sought to be enforced is the right to subject the property to the payment of the lienors' claims, and the liability of the sureties to pay them is a subject germane to the primary purpose of the action and may be determined and enforced therein. *Ibid.*
5. The fact that one contractor and his surety have no interest in the liabilities arising out of the contract and bond of another contractor on the same building, where all are made parties to a single lien action, does not create a misjoinder of parties or of causes of action. *Ibid.*

Same: Pleading: Cross-complaint.

6. Under sec. 2656*a*, Stats. (1898), the owner may properly, by cross-complaint in such action, set up the liability of the principal contractors and the sureties upon their respective bonds, they being codefendants in the action, and demand that they be required to pay the amounts due on such bonds into court, thereby relieving the premises to that extent from the liens claimed by the other parties to the action. *Warren Webster & Co. v. Beaumont Hotel Co.* 1

Same: Right to jury trial.

7. It is not a valid objection to the exercise of such jurisdiction that the parties are thereby deprived of the right to have the issues tried by a jury. *Warren Webster & Co. v. Beaumont Hotel Co.* 1

Same: Adjudication of rights and liabilities.

8. In lien foreclosure suits the provisions of sec. 2883, Stats. (1898), giving the circuit court power "to determine the ultimate rights of the parties on each side, as between themselves, either on cross-complaint or equivalent pleadings or otherwise," and to grant to a defendant "any affirmative relief to which he may be entitled," are peculiarly applicable; and the liabilities of sureties upon contractors' bonds are sufficiently connected with the subject of the action to authorize the court to make a complete and final determination of the rights and liabilities of all parties, including a claim of the owner against the obligors upon one of such bonds for damages for nonperformance or for defective performance of the contract. *Warren Webster & Co. v. Beaumont Hotel Co.* 1

MINORS. See ELECTRICITY. EXECUTORS AND ADMINISTRATORS, 1–3. MASTER AND SERVANT, 6.

MISCONDUCT OF COUNSEL. See TRIAL, 1.

MITIGATION OF DAMAGES. See CONSPIRACY, 10. MASTER AND SERVANT, 2, 3.

MONEY RECEIVED.

See TAXATION, 7.

The basis of a common-law action for money had and received is not only the loss occasioned to the plaintiff on account of payment of the money, but also the consequent enrichment of the defendant by reason of having received the same. *Marine Co. v. Milwaukee,* 239

MORTGAGES.

Form: Trust deed. See INSURANCE, 1.

Same: Deed absolute in form.

1. A deed absolute in form, but given to secure the payment of moneys due from the grantor to the grantee, with a contemporaneous contract to reconvey on payment of the debt, establishes the relation of mortgagor and mortgagee between the parties. *Falbe v. Caves,* 54

Covenant to pay taxes. See TAXATION, 1.

Foreclosure: Deficiency judgment.

2. An order in the original decree of foreclosure that a judgment for any deficiency be entered is a condition precedent to such a judgment. *Godfrey v. Wright,* 372

3. Under sec. 2656*a*, Stats. (1898), where the answer of a second mortgagee, who was made a defendant in an action to foreclose the first mortgage, was not served upon the mortgagor, the court did not acquire jurisdiction of the mortgagor for the purpose of granting affirmative relief against him in favor of such second mortgagee. *Ibid.*

4. In such a case a judgment for deficiency entered against the mortgagor in favor of the second mortgagee was void and might be set aside on motion at any time. *Ibid.*

Right of mortgagee to redeem from execution sale. See EXECUTION, 2.

MUNICIPAL CORPORATIONS.

Ordinances. See JURY. MUNICIPAL CORPORATIONS, 36–38. RAILROADS.

Same: Validity: Reasonableness.

1. In the enactment of municipal ordinances, as well as of statutes, reasonable classification is permissible, subject to constitutional limitations; and only where the bounds of legislative discretion are clearly exceeded will the court deny validity to the legislation. The general rules governing proper classification are the same in both cases. *Maercker v. Milwaukee,* 324
2. There is reasonable ground for discrimination between the business of rendering offal and shop fats collected from butcher shops and that of rendering fresh material from animals slaughtered on the premises where rendered, and an ordinance prohibiting the former within certain limits, while permitting the latter, is valid. *Ibid.*
3. Where municipal legislative action proceeds from authority expressly granted, and the facts are undisputed, the question whether a city council has exceeded its power by enacting an unreasonable ordinance is purely judicial, to be considered substantially the same as the question whether the legislature has in a given case exceeded its constitutional authority, reasonable doubts being resolved in favor of municipal power. *Ibid.*

Same: Franchise to street railway: Repairing and repaving portion of streets: Practical construction.

4. In granting a franchise for a street railway a city council acts as a trustee for the public, and it is its imperative duty to guard the public interests in every way reasonably within its power. *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 520
5. If the franchise granted contains stipulations or provisos evidently intended to protect the public interests, it will be assumed that they were inserted to secure and conserve for the public advantages which are valuable and substantial, rather than trifling and inconsiderable; and if the language used be equally capable of two constructions, that which safeguards the public interest substantially must be given preference to that which secures only an insignificant or unsubstantial advantage. *Ibid.*
6. In a franchise running for thirty-seven years, a provision that the railway company "shall keep and maintain in good and thorough repair during the continuance of said term" that portion of the street lying between the outside rails of the tracks, and one foot on either side thereof towards the curb line, "of the same material as that of which the said street shall be composed at any time when such repairs shall be necessary," means that the company is to keep a certain part of the street in repair, and that when a given pavement becomes defective and unsafe the company must renew that portion of the pavement within its zone, using the same material which the city uses in the remaining portion of the street. *Blount v. Janesville,* 31 Wis. 648, distinguished. *Ibid.*
7. Upon consolidation of street railway companies operating in a city under separate franchises, a new franchise ordinance was passed by the council, extending to a uniform date the previous franchises, granting the use of additional streets, and contain-

ing certain uniform provisions as to repair of streets and pavements, but declaring that all rights reserved or secured to the city by the prior ordinances, relating to the laying of tracks "and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to the city the same as though this ordinance had not been passed," and further that the provisions of the prior ordinances "so far as any or either of them relate to . . . the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same . . . shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed." *Held*, that the provisions of the prior ordinance above stated (in No. 6) continued in force, unimpaired by the new ordinance. *Ibid.*

8. Where there is no ambiguity in an ordinance or statute the doctrine of practical construction has no application. *Ibid.*

9. The fact that after the passage of the new ordinance the city required the company to make repairs under its provisions could not estop the city from enforcing the broader and more comprehensive requirements, if any, contained in the prior ordinances, which still remained in force in addition to the requirements of the new ordinance. *Ibid.*

Officers: Civil service law: Appointment and removal.

10. By the civil service law (ch. 313, Laws of 1895), the manifest general intent was to place all municipal officers, in the cities referred to, except such officers as are specially excepted, under the merit system, both as to appointment and retention. *State ex rel. Hayden v. Arnold*, 19

11. The civil service law (ch. 313, Laws of 1895),—by necessary implication from its terms, by its manifest general purpose, and by such long understanding as to become, in practical effect, a part of it,—superseded all city charter provisions relating to the appointment and removal of assessors, inconsistent therewith. *Ibid.*

12. Under such civil service law, the tax commissioner in the city of Milwaukee, is the head of a principal department, having power to appoint the ward assessors as his subordinates and the power to remove them, anything in the city charter, existing at the date of the enactment, to the contrary notwithstanding. *Ibid.*

Same: Mandamus.

13. Where a head of a department has acted in good faith, under sec. 4, ch. 313, Laws of 1895, as amended by ch. 547, Laws of 1911, in the matter of the removal of a subordinate for cause, even though he may have been mistaken as to the existence of the cause assigned, the remedy given by said section by way of making answer and being heard in the matter is exclusive, and reinstatement will not be compelled by *mandamus* or other judicial proceeding. *State ex rel. Bannen v. Arnold*, 38

Property. See SCHOOLS AND SCHOOL DISTRICTS, 1, 2, 5, 6.

Public improvements: Municipal lighting plant: Use of streets: Certificate of convenience and necessity.

14. Where a city was authorized to use the proceeds of bonds in the construction of a municipal electric light plant, the expendi-

ture of a part of such proceeds to install machinery at the city's refuse incinerator for the purpose of using surplus steam there being wasted, such machinery to constitute an auxiliary plant and a unit of the main electric light plant, and to be used primarily for lighting purposes, was not an unlawful diversion of the fund, even though, incidentally, power generated in such auxiliary plant and not needed for lighting was to be used to operate the city's flushing station, it being intended that the value of the power so used should be charged to the sewerage fund and credited to the lighting fund. *Neacy v. Milwaukee,* 504

15. Express statutory authority having been conferred upon cities by sec. 926—11, Stats. (1898), to light streets, public buildings and grounds, it necessarily follows that they might use the streets for the accomplishment of such purpose. *Ibid.*

16. Where a city issued bonds, purchased a site, and expended money toward the construction of a municipal electric light plant before the passage of the public utility act (Laws of 1907, ch. 499) and before there was in existence in such city a plant operated under an indeterminate permit, no certificate of convenience and necessity from the railroad commission is requisite to enable it to go on and complete such plant and use the streets to distribute the electricity generated thereby. *Ibid.*

17. Under ch. 75, Laws of 1911, which legalizes under certain conditions invalid bonds issued by cities for the purchase or construction of electric lighting plants, and authorizes the use of the proceeds for the purpose intended, a city which has complied with such conditions is not required to obtain, in addition, a certificate of convenience and necessity from the railroad commission. *Ibid.*

Same: Illegal contract: Right to compensation.

18. The facts that an alderman agreed to and did withdraw his opposition to the letting of a contract for a public improvement in consideration of a concession of pecuniary value made by the contractor to all persons, including such alderman, and that the alderman thereafter availed himself of such concession to his own private pecuniary advantage, are sufficient to avoid the contract. *McMillan v. Barber Asphalt Paving Co.* 48

19. The illegality inherent in such contract continued and vitiated it notwithstanding the resignation of the erring alderman and the subsequent execution of the written evidence of the contract by the remaining city officers. The relation of principal and agent did not exist between the city and the alderman so that the city could, by accepting the benefits of the corrupt contract, ratify it. *Ibid.*

Same: Streets: Change of grade: Measure of damages.

20. The true measure of damages to abutting property for a change in the grade of a street is the difference in the market value of the property immediately before and immediately after such change. *Milwaukee Trust Co. v. Milwaukee,* 224

21. In an action involving assessment of damages for a change in the grade of a street, evidence relating to the loss of rentals and to the cost of restoration is proper as bearing on the question of depreciation, but neither can be made an independent ground of recovery. *Ibid.*

22. The evidence as to the cost of restoration should be confined to a time at or about the date of the assessment. *Ibid.*

23. Error in admitting evidence of the cost of restoration four years afterward was not prejudicial where questions as to the market value before and after the change of grade were properly submitted and answered in the special verdict and such answers were supported by other competent and sufficient evidence; even though, in answer to another question, improperly submitted, the jury found the cost of restoration to be precisely the same amount as the difference in the market value. *Ibid.*

24. In an action involving assessment of damages for a change in the grade of a street, it would have been proper to instruct the jury to the effect that the testimony of witnesses who measured distances and made memoranda thereof at the time, if otherwise credible, is of greater weight than the evidence of witnesses who merely give their recollection based on estimates of such distances; but the refusal to give such an instruction is not ground for a reversal where the evidence related to a matter not directly in issue, but forming one of the bases for the estimates of value or of damages made by the witnesses, and those estimates also rested upon actual inspection of the property. *Ibid.*

Same: Special assessments. See APPEAL, 2. DEEDS. JUDGMENT, 1–5. TAXATION, 6.

Same: When "tax" includes special assessment: Setting aside: Conditions precedent: Constitutional law.

25. Whether or not the word "tax" in a statute includes a special assessment must generally be gathered from the context of the particular statute and the intent of the legislature as ascertained from the general scope of the act and the related acts of which it is designed to become a part. *Wisconsin Real Estate Co. v. Milwaukee,* 198

26. There is no occasion to distinguish between general taxes and special assessments in a statute relating to tax proceedings after they have reached the stage of a tax sale, since both are included in the same sale, certificate, and deed. *Ibid.*

27. Sec. 1210*h*—1, Stats. (Laws of 1909, ch. 295), is general in its nature and applies to contested special assessments as well as to general taxes. *Ibid.*

28. The subhead of the statute under which said sec. 1210*h*—1 is found contains various provisions expressly relating to and mentioning special assessments, so that its title, "General taxes; Reassessment when assessment void," is not a safe or satisfactory criterion as to the sense in which the word "tax" is used in that section. *Ibid.*

29. Said sec. 1210*h*—1 relates to cases where, but for the errors or defects going to the validity of the assessment and affecting the groundwork of the tax, a valid tax or assessment could be laid, and not to cases where there is an absolute want of power. *Ibid.*

30. Thus construed, it does not violate sec. 1 of art. XIV or art. V of the amendments to the federal constitution, nor secs. 1, 9 of art. I of the state constitution. *Ibid.*

31. Where the common council of defendant city had jurisdiction, by charter, over the subject of laying drains, and plaintiff's lands were within its taxing district, but it failed to proceed

according to the charter in that it ordered drains to be laid before it passed a resolution for the paving of the streets and, as to one street, failed to give notice to lotowners to construct the drain, such errors were mere errors of procedure affecting the groundwork of the tax and brought the case within the statute, so that an order to pay the assessment as a condition of maintaining an action to restrain its collection was proper. *Ibid.*

Same: Reassessment.

32. The reassessment statute (sec. 1210*d*, Stats.) does not apply where, as here, the work has been done in the face of pending preventive litigation. *McMillan v. Barber A. P. Co.* 48

Police power: Licensing occupations.

33. A city has no authority to impose license taxes upon persons engaged in particular occupations or, for the purpose of regulating such occupations under the police power, to require that persons engaged therein be licensed, unless such authority has been expressly or by necessary implication granted by the state. It cannot be implied from the "general welfare" clause in the city charter. *Chain Belt Co. v. Milwaukee,* 188

34. A statute giving power to license must be strictly construed, and doubt or ambiguity arising out of the language employed must be resolved in favor of the public. *Ibid.*

35. Neither the general statutes nor the charter of the city of Milwaukee give that city power to license elevators or elevator operators. *Ibid.*

Use of streets: Regulations: Law of the road: Motor vehicles.

36. A city may make reasonable police regulations respecting the use of its streets, not contravening the letter or spirit of any statute on the subject. *Oshkosh v. Campbell,* 567

37. A city ordinance providing that a vehicle turning to the right into another street shall turn the corner as near the right curb as possible, is not in conflict with secs. 1636—47 to 1636—57, Stats. (Laws of 1905, ch. 305, and Laws of 1907, ch. 516), regulating motor vehicles on public highways. *Ibid.*

38. The fact that defendant, while driving his automobile along the right-hand side of a street and intending to turn to the right into a cross street, found the way obstructed by two street cars and by people standing between them and the right-hand curb, did not justify him in crossing to and proceeding on the left-hand side of the cross street, instead of slackening his speed or stopping and waiting for an opportunity to proceed near the right-hand curb. *Ibid.*

Same: Obstructions to travel. See RAILROADS.

Same: Width of streets: Riparian rights: Encroachments: Nuisances.

39. Evidence showing, among other things, that a platted street, at the only point where its width was indicated in figures, was marked distinctly "49½ wide;" that the public travel was generally confined to that width; and that the south line of an hydraulic canal, shown on the plat but not constructed until afterward, was sixty-six feet north of the south line of the street and was intended by the person who made it to be constructed entirely on her own land, is *held* to sustain a finding

that the street was only forty-nine and one-half feet wide and that it did not border upon the canal. *Childs v. Dahlke*, 82

40. In such case the fee of lots abutting on the south side of the street stops at the center of the street, and the owners have no riparian privileges on the canal, regardless of whether it is navigable or not. *Ibid.*

41. Plaintiff was the owner of certain lots on the south side of the street, with the right by deed to draw for use thereon 150 inches of water from the hydraulic canal, and had exercised such right for more than twenty years by means of a conduit crossing the street and the strip of land north of it and entering the canal opposite his lots. After a flood had destroyed the works in part and washed away portions of the street in front of plaintiff's lots and the land north of it, defendants restored the land which was washed away, shortened the canal, and constructed an electric lighting plant in part upon the street in front of plaintiff's premises and in part upon the strip of land north of the street, thereby making it impossible for plaintiff to obtain his 150 inches of water as before or without increased expense. *Held*, that plaintiff was entitled to have the lighting plant, so far as it encroached upon the street (but not beyond that), abated as a nuisance, and that defendants should be required at their own expense to make the proper changes, constructions, and connections with the canal so as to effectively deliver to plaintiff the 150 inches of water to which he was entitled, at the north line of his lots. *Ibid.*

Fiscal management, public debt, securities, and taxation: Rights and remedies of taxpayers.

42. A taxpayer's action may be maintained to restrain the illegal issuance of municipal bonds or the diversion of public funds to an unlawful purpose. *Neacy v. Milwaukee*, 504

43. Where, in such an action, plaintiff claims that municipal bonds are invalid, the facts showing invalidity should be specifically and positively alleged. *Ibid.*

Claims against corporation: Filing: Verification.

44. Prior to the adoption of secs. 925—58 to 925—60, Stats., by the city of Oshkosh, its charter required all claims against the city to be verified and filed (Laws of 1891, ch. 59, subch. IX, sec. 1), and prohibited suits on any claim or demand until the same had been filed and disallowed (subch. XXI, sec. 4); but, the words "claim or demand" being held applicable only to claims arising on contract, tort actions might be brought against the city without the filing of a claim. By secs. 925—58 to 925—60, claims of all kinds, whether on contract or otherwise, were required to be filed, and suits thereon were prohibited until after filing and disallowance. *Held*, that the adoption of those sections by the city did not supersede or repeal sec. 1, subch. IX, of the charter, and that thereafter the requirement that claims should be verified applied to claims founded on tort as well as those on contract. *Hutchinson v. Oshkosh*, 573

45. Under secs. 925—58 to 925—60, Stats., claims for personal injury or death must be presented to the city council, and only by such presentation and an appeal as therein provided can the circuit court acquire jurisdiction. *Moyer v. Oshkosh*, 586

46. No great amount of formality is required in claims presented to a municipal corporation, and a construction which will preserve a *bona fide* claim is to be preferred to one which will have the effect to cut it off without trial. *Ibid.*

47. Thus, a claim presented by a widow as special administratrix of the estate of her deceased husband, for damages sustained on account of his death by "the estate and his legal representatives and heirs," which shows upon its face that death ensued instantaneously, should not be limited, by a narrow and technical construction of the terms "legal representatives" and "heirs," to a mere claim in favor of the estate, but those words should be construed in a popular sense and as including the widow; and so construed it constitutes a claim under secs. 4255, 4256, Stats., in favor of the widow as beneficiary. *Ibid.*

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 2–11.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS. See ARMY AND NAVY. EXECUTORS AND ADMINISTRATORS, 4.

NECESSARIES. See PARENT AND CHILD.

NECESSARY PARTIES. See ACTION, 2, 3.

NEGATIVE TESTIMONY. See APPEAL, 12.

NEGLIGENCE.

Acts and omissions constituting negligence. See CARRIERS. DEATH. ELECTRICITY. MASTER AND SERVANT, 4–38. MUNICIPAL CORPORATIONS, 47. STREET RAILWAYS. TRIAL, 12, 13.

Proximate cause. See CARRIERS, 2, 3. EVIDENCE, 1, 2. MASTER AND SERVANT, 11, 12, 19.

1. To warrant a recovery in a personal injury action the cause of the injury must not rest in conjecture, but must be established to a reasonable certainty. *Zuwodnicek v. Higgins Spring & Axle Co.* 118

2. While mounting a ladder to inspect a ventilating fan in defendant's engine room, plaintiff, a carpenter in defendant's employ, slipped and his hand was involuntarily thrown into the fan and injured. Assuming, as claimed by the plaintiff, that grease on his shoes caused him to slip, yet, there being no evidence from which the jury could determine whether such grease came from the floor of the engine room or from the floor of the garage which plaintiff had crossed before entering the engine room and of the greasy condition of which he knew, and, even if it were conceded that the grease came from the engine-room floor, there being no evidence that it had remained upon such floor long enough to show negligence on defendant's part, a verdict for defendant was properly directed. *Kaszubowski v. Johnson Service Co.* 149

3. Defendant was engaged under a contract in erecting an addition to the power plant of an electric railway company, and had placed several large iron girders so that one end rested upon a concrete wall and the other end upon a large pile of rubbish in an adjacent excavation. While they lay in that position, apparently secure, a small girder lying near was lifted by a

derrick from the rubbish pile, and the plaintiff, who with other employees of the railway company had been engaged in picking up wood and lumber from the pile and who had stood aside during the lifting of the small girder, resumed his work. Within a few minutes thereafter, the cause being otherwise unexplained, the end of one of the large girders slipped from the pile against plaintiff and broke his leg. *Held*, that so far as appears the fall of the girder was purely accidental, the cause thereof resting wholly in conjecture, and that findings by the jury to the effect that the injury was proximately caused by negligence of the defendant in lifting the small girder were unwarranted. *Sapienza v. Worden-Allen Co.* 210

4. A judgment in an action founded on negligence may properly be sustained upon a verdict finding two proximate causes. Both will be treated as proximate and concurrent unless the evidence forbids; and if the evidence shows that one is proximate and the other remote and indirect or even no cause at all, the true proximate cause will support the judgment and the other finding be rejected as surplusage. *Guse v. Power & Mining Machinery Co.* 400

5. If the evidence shows that neither of the causes found is the proximate cause, the judgment cannot stand except in a case in which the uncontradicted evidence shows the true proximate cause, or a case in which the matter was not brought to the attention of the trial court and in which, in support of the judgment, a finding of proximate cause will be presumed to have been made by the court, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346). *Ibid.*

6. A disjunctive finding in a special verdict to the effect that one or the other of two negligent acts was the proximate cause of an injury cannot be considered a finding that either one was such cause, where there was evidence from which the jury might have found that either one was and the other was not and it does not appear from the record that the entire jury agreed as to either one of the two. *Tosty v. Morgan Co.* 601

Gross negligence. See STREET RAILWAYS.

Contributory negligence. See CARRIERS, 3. ELECTRICITY. MASTER AND SERVANT, 6, 20, 24, 25, 34, 35. TRIAL, 12.

7. Upon conflicting evidence as to the circumstances surrounding the plaintiff and the conditions under which he worked, the question of his contributory negligence was for the jury. *Krawiecki v. Kieckhefer Box Co.* 176

8. In an action for personal injuries sustained in a collision between a buggy in which plaintiff was riding and a team of horses driven by defendant, a finding by the jury that plaintiff was free from contributory negligence is *held* to be sustained by the evidence. *Ehnert v. Mews,* 425

9. Evidence in such case that the plaintiff had turned out or made a curve in order to pass in front of another team which was crossing in the same direction as defendant but nearer to her, would not, even if true, establish negligence on her part as a matter of law. *Ibid.*

10. Evidence showing, among other things, that there was no warning light or danger signal in the usual and ordinary line of vision when deceased rode on his bicycle into the open draw of

a bridge; that the night was dark, with snow, sleet, and a high wind; that the bridge was insufficiently lighted; and that to the knowledge of the deceased there was a system of gongs which were supposed to ring when the draw was open, but that they failed to operate at the time of the accident, is *held* sufficient to sustain a finding by the jury that the deceased was not guilty of contributory negligence. *Stephani v. Manitowoc*, 101 Wis. 59, distinguished. *Moyer v. Oshkosh*, 586

11. The fact that travelers on foot who heard the warning bell rung before the bridge opened, and who were on the lookout for it, testified that they could see the open draw, did not require the court to reject the jury's finding to the effect that the conditions were such that an ordinarily careful traveler approaching the draw might not see that it was open in time to save himself. *Ibid.*

12. One who, from past experience, has reason to believe that a continuous alarm is sounded at a bridge while it is open, may well be excused for approaching such bridge in the darkness with greater confidence than one who knows there is no such alarm. *Ibid.*

13. The fact that the trial judge struck out one finding in the special verdict, to the effect that the deceased, if he had looked, could not have seen, before he reached the draw, that it was open, was not inconsistent with his leaving undisturbed another finding, in substance that the bridge was so poorly lighted that an ordinarily prudent traveler, under the circumstances surrounding the deceased at the time, might approach the draw without seeing that it was open until too late to save himself. *Ibid.*

NEW TRIAL. See APPEAL, 7, 21. COURTS, 4. EVIDENCE, 9.

NONSUIT. See DISMISSAL AND NONSUIT. MASTER AND SERVANT, 29.

NOTICE.
Of examination under sec. 4096. See CORPORATIONS, 15, 17.
Of proceeding for appointment of administrator *de bonis non*. See EXECUTORS AND ADMINISTRATORS, 1.
Of injury. See LIMITATION OF ACTIONS.

NUISANCE. See MUNICIPAL CORPORATIONS, 39–41.

OFFICERS.

Federal officers: Governor of Soldiers' Home. See ARMY AND NAVY.

Municipal officers. See MUNICIPAL CORPORATIONS, 10–13, 18, 19.

Town officers. See INJUNCTION.

Title to and possession of office: Removal: Mandamus. See MANDAMUS, 1, 2. MUNICIPAL CORPORATIONS, 10–13.

1. A person who has been, under the forms of law, dispossessed of an office to which he, at best, had only a *de facto* right, is not entitled to regain possession by *mandamus*. *State ex rel. Hayden v. Arnold*, 19

2. The rule giving *de facto* dignity to the occupant of an office, is for the protection of the public; not to furnish him a weapon with which to regain possession. Being possessed thereof, he can defend against one who attempts to intrude thereinto; but cannot rely upon his *de facto* character to gain or regain that to which he has no right, in fact. *Ibid.*

3. The power of appointing and removing subordinate officers having been conferred upon their superior, and procedure provided for executing such power and for use of a removed officer, in case of his deeming himself aggrieved, such procedure is exclusive in case such superior, in good faith, acts within the law. *Ibid.*

OPINION EVIDENCE. See EVIDENCE, 6–9.

ORDINANCES. See JURY. MUNICIPAL CORPORATIONS, 1–9, 36–38. RAILROADS.

PARENT AND CHILD.

Paternity: Legitimation: Heirship. See DESCENT AND DISTRIBUTION.

Liability for necessaries: Stepfather.

A stepfather is liable for the value of medical and surgical services rendered to his stepson, to whom he stood in the position of parent, where a special exigency as to the boy's health existed, requiring the treatment, and the stepfather, knowing the boy's condition and that treatment was necessary and was being furnished, made no objection but so acted throughout as to show approval of what was being done. *Monk v. Hurlburt,* 41

PAROL EVIDENCE. See EVIDENCE, 3–5. TAX TITLES.

PARTIES.

Necessary parties. See ACTION, 2, 3. MECHANICS' LIENS, 3–5.

Proper parties.

In *mandamus* by the newly elected officers of a school district, after the annexation of part of its territory to a city, to obtain control of the property of the district in the hands of the old officers who resided in such annexed territory, an adjudication as to whether or not a joint district was created by such annexation was necessary to a disposition of the case, and the city, being interested in that question, was a proper party defendant. *State ex rel. School Dist. No. 1 v. Schriner,* 162

Joinder of parties. See MECHANICS' LIENS, 3, 5.

Legal capacity to sue. See PLEADING, 3, 4.

PARTNERSHIP.

1. A partnership was not created between the owner of a farm and one to whom he let the same on shares, although the contract contained provisions for the joint purchase and ownership of live stock for use on the farm, a sharing of certain other expenses, an advisory supervision of the farm work by the owner, and joint ownership of the produce of the farm until sale or division; especially where it was expressly stipulated in the contract that it should not be construed as constituting a partnership and that neither party should have power to contract debts on behalf of the other. *Wagner v. Buttles,* 668

2. To constitute one a partner in an enterprise he must share in the profits as such and not as compensation for services or for the use of the property. *Ibid.*

3. Where a farm is let in consideration of a share of the crops, there is no division of profits as such, since the tenant's share may represent a loss to him and the landlord is not bound to make good any portion of said loss. *Ibid.*

PAYMENT.

A finding by the trial court that a promissory note, which had been returned to the maker marked "paid," had in fact been paid; is *held* to be sustained by the evidence. *Vote-Berger Co. v. Carter-Wabeno Telephone Co.* 103

PERSONAL INJURIES. See APPEAL, 20, 21. DEATH. ELECTRICITY. EVIDENCE, 1, 2, 7–9. MASTER AND SERVANT, 4–38. MUNICIPAL CORPORATIONS, 45, 47. NEGLIGENCE. STREET RAILWAYS. TRIAL, 5, 12, 13.

PLATS. See MUNICIPAL CORPORATIONS, 39–41.

PLEADING.

Necessary averments. See MASTER AND SERVANT, 3. MUNICIPAL CORPORATIONS, 43.

Complaint. See DEEDS, 2. FRAUD, 1. MUNICIPAL CORPORATIONS, 43. PLEADING, 1.

Answer. See ACTION, 3.

Counterclaim. See APPEAL, 22. COSTS, 1.

Cross-complaint. See MECHANICS' LIENS, 6.

Demurrer. See APPEAL, 3. CORPORATIONS, 11.

1. In an action on contract to recover a balance claimed to be due for services of plaintiff and moneys advanced in the erection of a factory building for defendant, the complaint (set out substantially in the opinion) is *held*, on demurrer, to be sufficient. *Danielson v. Garage Equipment Mfg. Co.* 492

2. Where a complaint sets up two causes of action, pleaded together and not separately stated, the remedy is by motion, not by demurrer. *Ibid.*

3. In an action against a removed executor and the sureties on his bond, brought in the name of the county judge for the benefit of the estate, pursuant to sec. 4015, Stats., the complaint showed that an administrator *de bonis non* to succeed the executor had been appointed on a legal holiday. Assuming that such appointment was for that reason without authority and hence that such administrator had not legal capacity to cause the action to be instituted, and treating him as the real plaintiff, such want of capacity was waived by failure of the defendants to demur to the complaint on that ground. [Whether in such action the defendants could object to the validity of the appointment of the administrator *de bonis non*, not decided.] *Jenks v. Allen,* 625

4. A demurrer *ore tenus* goes to the cause of action and does not reach plaintiff's want of legal capacity to sue. *Ibid.*

5. A demurrer by way of answer is not recognized in this state. *Ibid.*

Amendment to conform to proof. See APPEAL, 8. MASTER AND SERVANT, 17.

6. Amendment of the complaint to make it conform to the proof was properly allowed after verdict, where the questions embraced in such amendment were litigated on the trial and all of the facts were before the court. *Monk v. Hurlburt,* 41

POLICE POWER. See MUNICIPAL CORPORATIONS, 33–38.

POSSESSION. See ADVERSE POSSESSION. EVIDENCE, 3. OFFICERS.

PRESUMPTIONS. See DAMAGES, 7. MASTER AND SERVANT, 12. NEGLIGENCE, 5. TAXATION, 3.

PRINCIPAL AND AGENT. See FRAUD, 5. MUNICIPAL CORPORATIONS, 19.

PRINCIPAL AND SURETY.

See APPEAL, 23–25. EXECUTORS AND ADMINISTRATORS, 2, 3. GUARANTY. MECHANICS' LIENS, 3–6, 8. PLEADING, 3.

1. Where a building contractor gave a bond with surety, conditioned that he would duly perform the contract and "pay and discharge all indebtedness that may be incurred in carrying out and completing said contract" and save the owner and building "free and harmless from all mechanics' liens and claims of liens, or other claim or expenses by reason thereof," these stipulations evinced a purpose and intent that the surety should secure payment for the material and labor furnished by the contractor, including that procured from third persons; and the latter were entitled to the benefit of such indemnity and could enforce their rights in all respects as if they had been parties to the contract and bond. *Warren Webster & Co. v. Beaumont Hotel Co.* 1

2. In such case a subcontractor is entitled to a lien upon the building and also to enforce, by action on the bond, the liability of the surety for payment of his claim. *Ibid.*

PRINTED CASE. See APPEAL, 5.

PRIVILEGED COMMUNICATIONS. See LIBEL AND SLANDER, 4–13.

PRIVITY. See ADVERSE POSSESSION.

PROVISIONAL REMEDIES. See APPEAL, 2.

PROXIMATE CAUSE. See CARRIERS, 2, 3. EVIDENCE, 1, 2. MASTER AND SERVANT, 11, 12, 19. NEGLIGENCE, 1–6.

PUBLIC LANDS.

1. A contract by which a homesteader agrees, in consideration of a certain sum to be paid to him, to relinquish his homestead entry to the United States and surrender possession of the land, so that another may enter and acquire title under the homestead laws and incidentally obtain the benefit of improvements which have been made, is not contrary to public policy and is valid. *Dohr v. Wolfgang,* 95

2. The promise to pay, in such a case, is based upon a sufficient consideration moving from the homesteader, whether, after he has relinquished his entry, the promisor secures the homestead or not. *Ibid.*

3. Such a contract is not one for the sale of land or of any interest therein, and is therefore not within the statute of frauds (sec. 2304, Stats. 1898). *Ibid.*

PUBLIC POLICY. See PUBLIC LANDS, 1.

PUBLIC UTILITIES.

Rules: Approval by railroad commission: Refusal to comply: Discontinuance of service: Injunction.

[1. Whether, in view of secs. 1797*m*—64 to 1797*m*—66 of the public utilities law (ch. 499, Laws of 1907), a circuit court other than that for Dane county had jurisdiction to entertain an action by a private individual to restrain a public utility from discontinuing its service to the plaintiff because of his refusal to comply with rules filed by the utility with the railroad commission,—no formal order approving such rules having been made by the commission or being expressly provided for in the law, and there being no express provision requiring the commission to investigate into the reasonableness of such rules upon the complaint of a single citizen,—not determined.] *Walbridge v. Berlin Public Service Co.* 69

2. A rule of a public utility company supplying hot water for heating purposes, providing for installation of thermostats by the company at cost, being on its face reasonable, and there being no showing that the cost would be great or that the time necessary for installation would be so long as to materially interfere with the comfort or health of the occupants of plaintiff's house and no contract existing by which the company was bound to furnish heat to plaintiff for any fixed time, there was no ground for interference by a court of equity to restrain the company from discontinuing its service because of plaintiff's refusal to comply with said rule and permit the company to install a thermostat. *Ibid.*

Special contract for service: Validity: Discrimination.

3. A special contract, executed prior to April 1, 1907, between a telephone company and a stockholder therein and embodied in the stock certificate issued to him upon his subscription therefor and payment of the par value and ten per cent. additional, stipulating that he should possess, as owner, one telephone and be entitled to the use of the company's lines in common with those having rented telephones in the same locality, subject to assessments upon the stock sufficient to pay the corporate expenses, but not exceeding $10 per year, was valid under sec. 1797*m*—91, Stats. (Laws of 1907, ch. 499). *People's Telephone Co. v. Lewis,* 75

4. In the absence of proof that it is *unreasonably* discriminatory, such a contract does not come within the condemnation of the common law. *Ibid.*

5. Mere difference in method of dealing with customers, some by implied agreement to pay at schedule rates, and others by express contract, is not discrimination within the meaning of sec. 1791*a*, Stats. (1898). *Ibid.*

Municipal lighting plant: Certificate of necessity and convenience. See MUNICIPAL CORPORATIONS, 14–17.

RAILROAD COMMISSION. See PUBLIC UTILITIES.

RAILROADS.

Operation: Obstructing street crossings.

A municipal ordinance prohibiting railroads from obstructing the streets with their engines or cars, without naming a time limit within which cars may remain upon a crossing, is construed as not having been intended to interfere with the ordinary usual and careful operation of railroad trains, but merely as prohibiting unnecessary stops upon street crossings, or the continuation of a necessary stop for an unreasonable or unnecessary time. *Depow v. Chicago & N. W. R. Co.* 109

Same: Injuries to goods. See CARRIERS.

Same: Injuries to employees. See TRIAL, 12, 13.

RATIFICATION. See FRAUD, 13.

REAL PROPERTY. See ACTION, 1. ADVERSE POSSESSION. ARMY AND NAVY, 2. ARSON, 1. BROKERS. CEMETERIES. CORPORATIONS, 6, 7, 10, 11. DAMAGES, 2, 3, 5, 6. EVIDENCE, 3. EXECUTIONS. FRAUD, 1–9. GUARANTY, 1. PRINCIPAL AND SURETY. PUBLIC LANDS. SPECIFIC PERFORMANCE. TAXATION. TAX TITLES. VENDOR AND PURCHASER. WILLS.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 32.

RECEIVERS.

1. The power of the circuit court to appoint a receiver for a corporation exists under its general equity jurisdiction, and is not limited to cases coming within the express provisions of the statutes. *Katz v. De Wolf,* 337
2. The rule that where a court refuses to exercise a discretionary power on the erroneous assumption that the power does not exist the order appealed from should be reversed, has no application to cases in which there is no sufficient ground shown for the exercise of the court's discretion, nor to cases in which the court decided that, even if it had the power, it would in the exercise of its discretion deny the motion. *Ibid.*
3. The mere fact that a deadlock exists between contending groups of stockholders and that charges of misconduct are made against the group in control, does not authorize a court of equity, upon affidavits and in advance of a trial upon the merits, to appoint a receiver for a solvent corporation and thereby wrest the control of its property and business from its duly elected officers, where such charges of misconduct are denied and where there is no imminent danger of loss of the corporate property or of any other injury to the moving party which cannot be fully compensated by the final decree. *Ibid.*

[4. Whether or not a mere deadlock in the affairs of a corporation, caused by contending factions among the stockholders, preventing an election of directors and a harmonious conduct of its business, would be sufficient ground for a court of equity by final decree to dissolve the corporation, appoint a receiver, and direct a sale of the corporate property and a distribution among the shareholders, not decided.] *Ibid.*

REDEMPTION. See COSTS, 1. EXECUTION. VENDOR AND PURCHASER, 4–6.

RE-EXAMINATION. See WITNESSES.

RELEASE. See LANDLORD AND TENANT, 1.

REMARKS OF COUNSEL. See TRIAL, 1.

REMEDIES. See MANDAMUS. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 13, 42. OFFICERS.

REMOVAL.
Of executor. See EXECUTORS AND ADMINISTRATORS, 1–3. PLEADING, 3.
Of officers. See MANDAMUS, 1, 2. MUNICIPAL CORPORATIONS, 10–13. OFFICERS, 3.

RENT. See LANDLORD AND TENANT, 1–3.

RENUNCIATION BY WIDOW. See WILLS, 5–9.

REPEAL of statute. See STATUTES, 1.

REPLEVIN.

1. In replevin the facts, stated in the opinion, together with evidence tending to show that the present property consists of the natural increase of live stock owned by plaintiff, and new stock and farm implements purchased by him with money earned by himself, are *held* to sustain a verdict for plaintiff. *Albright v. Albright*, 610
2. Unless defendants paid something for the property, or changed their position to their substantial prejudice in reliance upon their mother's apparent ownership, plaintiff was not estopped from claiming title because he had permitted his mother to deal with it as if she owned it. *Ibid.*
3. Although the cross-examination of plaintiff in such action was somewhat narrowly restricted by exclusion of questions as to claims filed by him against his mother's estate, as to whether he knew the provisions of her will, and as to a previous action of replevin brought against his brothers, yet, it not appearing that such matters would have thrown any light upon the issues, the error, if any, was not prejudicial. *Ibid.*
4. Evidence in such case that plaintiff had bought goods and other property for use on the farm, paying for them with his own money, was admissible as tending to throw light on the question of ownership. *Ibid.*

REPUTATION. See ARSON, 2.

RESCISSION. See FRAUD, 10, 13.

RESIDUE. See WILLS, 5–19.

RES JUDICATA. See JUDGMENT.

RIPARIAN RIGHTS. See MUNICIPAL CORPORATIONS, 40, 41.

RULES AND REGULATIONS. See PUBLIC UTILITIES, 1, 2.

RULES OF COURT.
Supreme Court Rule 44 (Costs and penalties), 485.

SCAFFOLDS. See MASTER AND SERVANT, 21–28.

SCHOOLS AND SCHOOL DISTRICTS.

Annexation of part of district to city: Joint districts: Title to property. See PARTIES.

1. Sec. 422, Stats. (Supp. 1906: Laws of 1901, ch. 304), declaring that "no new joint district embracing a part of any city shall be hereafter formed," prohibits the formation of a joint school

district embracing part of any city, either by direct action or by operation of law. *State ex rel. School Dist. No. 1 v. Schriner*, 162

2. Thus, the annexation by a city of a part of the territory of a school district in an adjacent town did not result in the formation of a joint school district, but that portion of the district which remained in the town constituted a separate school district and the portion annexed to the city became an integral part of the school system of the city. *Ibid.*

3. The annexation of a portion of the town to the city was not a "division" of the town within the meaning of sec. 415, Stats. (1898), which provides that districts become joint, without other action, upon the division of a town. That provision applies only where a town is divided and each division thereof remains under a town government. *Ibid.*

4. In the case stated, until a proper apportionment was made according to law the legal title to the school property, other than real property situated in the part annexed to the city, remained unaffected, and the proper officers of the district were entitled to the custody and control thereof. *Ibid.*

5. Sec. 944, Stats. (1898), applies to a case where territory of one municipality is annexed to another, and contemplates a division of property and adjustment of credits and liabilities in such case as well as in a case where one municipal entity is divided into two distinct municipal entities. *Ibid.*

6. The provision of that section (added by the revision of 1898) to the effect that the territory detached from any municipality shall be liable to the remaining portion "for the excess of such share of the municipal property as is situated within it," operates to vest the title to such property in the detached portion, subject to the duty to pay the remaining portion its just share of the value thereof. *Ibid.*

SERVICE of process, notices, etc. See CORPORATIONS, 15–17. LIMITATION OF ACTIONS.

SHERIFFS. See STIPULATIONS, 1.

SLANDER. See LIBEL AND SLANDER.

SOLDIERS' HOME. See ARMY AND NAVY. EXECUTORS AND ADMINISTRATORS, 4.

SPECIAL ASSESSMENTS. See APPEAL, 2. DEEDS. MUNICIPAL CORPORATIONS, 25–31. TAXATION, 6, 7.

SPECIAL VERDICT. See ANIMALS, 2. MASTER AND SERVANT, 13, 30, 32–34. MUNICIPAL CORPORATIONS, 6, 23. NEGLIGENCE, 13. TRIAL, 1, 8–14.

SPECIFIC PERFORMANCE.

See CORPORATIONS, 14. VENDOR AND PURCHASER, 3.

The decreeing of specific performance rests largely in the discretion of the court; and where a good title was not tendered by plaintiff until upon the trial of the action it was not an abuse of discretion to award specific performance only upon payment to defendants of the amount properly chargeable to plaintiff upon an accounting as to interest, taxes, rents, etc. *Stack v. Hickey*, 347

Same: Practical construction. See MUNICIPAL CORPORATIONS, 8, 11. STATUTES, 4.

Same: Statute adopted from another state.

10. A statute, adopted from another state, after having been there construed by its highest court, must be presumed to have been taken as construed. *Koepp v. National E. & S. Co.* 302

Same: Misleading title. See DEATH, 3, 4.

STAY OF PROCEEDINGS. See COURTS, 3, 4.

STEPFATHER. See PARENT AND CHILD.

STIPULATIONS.

See WILLS, 8.

1. Where money was deposited with the sheriff by a judgment debtor pursuant to a stipulation between the creditor and debtor that it should be applied upon the judgment "in the event of said debtor neglecting and refusing to file" an undertaking on appeal within a certain time, and three days before that time expired a good and sufficient undertaking was served on the attorney for the creditor and was retained by him for his own convenience until after the time fixed for filing had expired, but was filed by the debtor immediately upon its being returned to him, the creditor cannot be heard to say that the debtor *neglected and refused* to file the undertaking pursuant to the stipulation. (*Donahue v. Gunter*, 142 Wis. 465.) *Donahue v. Gunter,* 125

2. To put the debtor in default, under such circumstances, the creditor's attorney should have returned the undertaking in reasonable time for filing, even though no demand for such return was made. *Ibid.*

3. Even if a demand were necessary in such a case, the fact that on the last day for filing the attorney for the debtor called twice during ordinary business hours at the office of the creditor's attorney for the purpose of getting the undertaking, and found the door locked, would excuse making demand. *Ibid.*

STOCK AND STOCKHOLDERS. See CORPORATIONS, 1–4. FRAUD, 10, 12, 13. PUBLIC UTILITIES, 3. RECEIVERS, 3, 4.

STREET RAILWAYS.

See MUNICIPAL CORPORATIONS, 4–9.

In an action against a street railway company for death of plaintiff's intestate, claimed to have been caused by gross negligence of a motorman whose car collided with a milk wagon on the step of which the deceased was riding, it is *held* that the evidence (showing that the gong was rung and that efforts were made to stop the car) did not warrant a conclusion of gross negligence, and that a verdict for defendant was properly directed. *Raasch v. Milwaukee E. R. & L. Co.* 170

STREETS. See MUNICIPAL CORPORATIONS, 15, 16, 20–32, 36–41. RAILROADS. STREET RAILWAYS.

SUBCONTRACTORS. See PRINCIPAL AND SURETY, 2.

SUBPŒNA. See CORPORATIONS, 15.

SUMMONS. See CORPORATIONS, 16.

SUPERINTENDING CONTROL. See COURTS, 1, 4.

SUPREME COURT. See APPEAL. COURTS.

SURETIES. See APPEAL, 23–25. EXECUTORS AND ADMINISTRATORS, 2, 3. GUARANTY. MECHANICS' LIENS, 3–6, 8. PLEADING, 3. PRINCIPAL AND SURETY.

SURPLUSAGE. See NEGLIGENCE, 4.

TAXATION.

Mortgage of exempt land: Covenant to pay taxes: Tax on bonds.

1. In a mortgage (in the form of a trust deed) securing bonds, the mortgagor agreed that it would pay all taxes thereafter lawfully assessed or imposed upon the mortgaged land, "or upon this mortgage, or the lien or interest created thereby, . . . prior to any sale for taxes," and would "deliver duplicate receipts showing the payment of all taxes levied or assessments made." This agreement was evidently drawn to meet the provisions of sec. 1042*d*, Stats., which declares that a mortgage upon taxable real estate shall, for the purposes of taxation, be deemed an interest in such real estate, and shall be assessed and taxed as such interest, etc.; but the mortgaged land was in fact exempt from taxation, so that said section was inapplicable. *Held*, that the agreement did not cover a personal property tax assessed against a bondholder on account of the bonds. Such a tax was not a tax upon the "mortgage," nor "upon the lien or interest created thereby." *Citizens S. & T. Co. v. School Sisters of Notre Dame*, 619

Assessment: Board of review: Jurisdictional errors.

2. The judicial review, on *certiorari*, of the action of a board of review extends only to the correction of jurisdictional errors. *State ex rel. Miller v. Thompson*, 184

3. An assessor's valuation laid before a board of review is presumed, in the absence of evidence to impeach it, to be correct; and it is also presumed that the decision of the board of review as to valuation is correct. *Ibid.*

Same: Valuation of property: Improvements: Evidence: Presumptions.

4. The fact, shown before a board of review, that real property is not on a paying basis as presently managed does not establish its value; nor does the fact that old buildings thereon if torn down would be worth only the wreckage establish their value as a going concern; nor does the fact that the owner will derive a larger revenue from a lease of the land for ninety-nine years, which has been made to one who will tear down the old and erect new buildings, show that the present buildings are not worth the assessor's valuation. *State ex rel. Miller v. Thompson*, 184

5. Evidence of such facts is not evidence of the market value of the property or the price which could ordinarily be obtained for it at private sale (sec. 1052, Stats.); and the affirmance by the board of review of the assessor's valuation, notwithstanding such evidence, was not a jurisdictional error. *Ibid.*

Reassessment. See MUNICIPAL CORPORATIONS, 32.

Special assessments. See APPEAL, 2. DEEDS. MUNICIPAL CORPORATIONS, 25–31.

Same: Illegality: Action to recover.

6. In sec. 1164, Stats. (1898), the word "tax" relates only to general taxes and not to special assessments. *Marine Co. v. Milwaukee,* 239

7. No common-law action lies against a city to recover, as for money had and received, the amount of a special assessment paid under protest, where before the action was commenced the city treasurer had, pursuant to law, paid over the amount so collected to the holder of the improvement certificate. *Ibid.*

TAXATION OF COSTS. See COSTS, 2.

TAXPAYER'S ACTION. See MUNICIPAL CORPORATIONS, 42, 43.

TAX TITLES.

Description of land: Certainty: Extrinsic evidence.

1. Descriptions of land in tax proceedings must be given the same effect as descriptions in ordinary conveyances between grantor and grantee, and if they indicate the land intended with ordinary and reasonable certainty they may be aided in their application to specified property by reference to extrinsic facts and circumstances. *Corry v. Scudder,* 104

2. Thus, a tax certificate describing the land sold as all of a certain city lot except the part owned by a person named, is not void for uncertainty; and the exact boundaries of the part owned by said person may be shown by extrinsic evidence. *Ibid.*

TELEPHONES. See PUBLIC UTILITIES, 3.

TENDER. See EXECUTION, 3, 4. VENDOR AND PURCHASER, 4–6.

TOWN SUPERVISORS. See INJUNCTION.

TRIAL.

Course and conduct of trial. See ANIMALS, 2.

Same: Arguments and conduct of counsel.

1. For counsel, in arguing to the jury upon a special verdict, to say they should or ought to answer the questions in a certain way, is not misconduct calling for a reversal. *Guse v. Power & Mining Machinery Co.* 400

Same: Reception of evidence. See APPEAL, 14, 15, 17. ARSON, 2. BROKERS. CONSPIRACY, 8–10. DEEDS, 2. EVIDENCE, 3. FRAUD, 6, 7. MASTER AND SERVANT, 8, 36, 37. MUNICIPAL CORPORATIONS, 21–24. REPLEVIN, 4.

2. Conclusions of fact are not always inadmissible in evidence. So far as they relate to collateral facts not directly in issue, they often save much delay and circumlocution, and hence should not be too rigidly excluded; and the same is true of leading questions. *Schultz v. Frankfort M., A. & P. G. Ins. Co.* 537

3. In an action for goods delivered and services rendered, the defendant, in opposing a motion for reference, stated in open court that he would not on the trial dispute certain items or the value thereof as claimed; but afterwards, on the trial, he testified without objection that he had not received some of such items and that others were not worth the amount charged

therefor. On a motion to strike out this testimony the court stated that it would cover the matter in the charge, and thereafter instructed the jury that defendant was bound by his first statement and that it was a verity in the case that the items referred to were furnished and were of the value claimed. *Held*, that there was no error prejudicial to plaintiff. *Morehouse v. Voight*, 580

4. The error, if any, in permitting defendant to testify that he had received the labor and materials for the value of which plaintiff sued without having any intention to pay therefor, became harmless when the court instructed the jury that the intention of defendant was wholly immaterial unless they also found that plaintiff did the work and furnished the materials without any intention on his part of making any charge or receiving any pay therefor. *Ibid.*

Questions for jury. See FRAUD, 11, 13. MASTER AND SERVANT, 5, 9, 10, 12, 20, 30. NEGLIGENCE, 7.

5. Whether defects in a contrivance furnished within sec. 1636—81, are known to the servant so as to charge him with assumption of the risk, is a jury question in case of there being any reasonable ground for differences of opinion in respect thereto. *Koepp v. National Enameling & S. Co.* 302

6. The decision in the affirmative as to whether a question is for the jury, involves a determination by the trial judge, as matter of fact, with superior opportunity to do so, that in reaching a final result a choice is required to be made between reasonably conflicting inferences, and, on appeal, all reasonable doubts must be resolved in favor thereof. *Ibid.*

7. Since an initial decision in the affirmative as to whether a matter should be submitted to the jury involves a determination, as matter of fact, that, at the best for the moving party there is room in the evidence for a decision of the ultimate matter either way, in case of a wrong verdict the difficulty inheres in the submission. *Ibid.*

Instructions to jury. See ANIMALS, 2. MASTER AND SERVANT, 15, 34, 35. MUNICIPAL CORPORATIONS, 24. TRIAL, 3, 4.

General verdict. See BROKERS. EVIDENCE, 8, 9.

Same: Directing verdict. See NEGLIGENCE, 2. STREET RAILWAYS.

Same: Setting aside verdict. See APPEAL, 10, 13.

Special verdict. See ANIMALS, 2. MASTER AND SERVANT, 13, 30, 32–34. MUNICIPAL CORPORATIONS, 6, 23. NEGLIGENCE, 13. TRIAL, 1.

8. Where the special verdict as submitted covers in proper form all of the issues raised by the pleadings and evidence, there is no prejudicial error in refusing to submit additional questions. *Krawiecki v. Kieckhefer Box Co.* 176

9. The submission to the jury of an improper question relating to a mere evidentiary fact is not a material error if, without such question, there is a complete special verdict. The answer to such surplus question may be disregarded. *Milwaukee Trust Co. v. Milwaukee*, 224

10. It is not an abuse of discretion, under sec. 2858, Stats. (Supp. 1906: Laws of 1903, ch. 390, sec. 1), to deny a request, made at the close of the testimony, for submission of a special verdict,

when there is but a single issue, which can be clearly defined and succinctly placed before the jury in the form of a general verdict. *Woteshek v. Neuman,* 365

Same: Submitting new questions in absence of counsel.

11. Where a jury returns into court after having retired to consider a special verdict, it is error for the court to submit a new and materially different verdict in the absence of counsel. *Johnson v. Lewis,* 615

Same: Changing answers.

12. Plaintiff's intestate, while in charge of a switching crew in defendant's yards, was run down and killed by cars which ran upon the wrong track because of the failure to turn a switch. Upon evidence showing that it was the duty of the deceased on this occasion to turn the switch and to give the signals for the movements of the cars, and that up to the time he stepped into the region of danger and was killed the movements of the cars were under his personal direction, it is *held* that the trial court was warranted in changing findings in the special verdict to the effect that negligence of other members of the crew directly contributed to the death, and in dismissing the action. *Sloan v. Chicago, M. & St. P. R. Co.* 645

13. The special verdict having been thus changed so as to negative the existence of negligence on the part of any one except the deceased, it is immaterial that the trial court did not formally set aside or change other findings by the jury to the effect that it was the duty of one of the other men to turn the switch (which finding was contrary to all the evidence), and that the negligence of the deceased was slighter as a contributing cause to the injury than that of the other switchmen. *Ibid.*

14. In such a case judgment might have been given in favor of defendant notwithstanding the verdict, without changing any of the findings therein; but the usual and better practice is to shape the verdict so that on its face it forms a basis for the judgment. *Ibid.*

UNDERTAKING. See APPEAL, 23, 24. STIPULATIONS, 1, 3.

UNGUARDED MACHINERY. See MASTER AND SERVANT, 7–9, 36–38.

USAGE AND CUSTOM. See MASTER AND SERVANT, 37, 38.

VACATING JUDGMENT. See MORTGAGES, 4.

VALUE. See DAMAGES, 1–6. TAXATION, 3–5.

VENDOR AND PURCHASER OF LAND.

Performance of contract: Title of vendor: Marketable title.

1. An apparent cloud upon the title to land, requiring a resort to evidence *aliunde* the record in order to show its invalidity, is sufficient to render the title unmarketable. *Stack v. Hickey,* 347

2. A title which is open to judicial doubt is not marketable. *Ibid.*

3. A duly recorded sheriff's deed upon the foreclosure of a second mortgage is a cloud upon the title previously acquired under a foreclosure of the first mortgage, although the second mortgagee was a party to the earlier action; and one who had contracted to convey the land free and clear from incumbrances

was not entitled to specific performance upon tendering merel the title acquired under such first foreclosure. *Ibi*

Failure of title to timber: Measure of damages. See DAMAGES, 2–

Foreclosure: Redemption: Tender: Extension of time.

4. In an action to recover damages, based on defendant's allege fraudulent concealment of himself whereby plaintiff was pr vented from paying or tendering the amount necessary to r deem certain lands in compliance with the terms of a jud ment of strict foreclosure of a land contract, it is *held*, co trary to findings by the jury, that there was no evidence tend ing to show that defendant ever concealed himself or rendere a tender impossible or that plaintiff used reasonable diligenc in an effort to find the defendant. *Loehr v. Dickson*, 46

5. Plaintiff having alleged and the jury having found that a thir person had paid him $70,000 for his rights and interest in th property covered by the land contract, a part of which sun he was ready and willing to pay to defendant to redeem th land, the evidence as to such payment and as to the existenc of such third person, tending to show that he was a myth, i discussed, and it is suggested that the finding of the jury i that regard might properly have been set aside in the interes of justice. *Ibid*

6. A conversation in which, on August 23d, the last day for re demption, at the request of a person acting for plaintiff, de fendant agreed to call at plaintiff's office on the afternoon o the next day and settle the matter up, might at most be held to amount to an agreement to extend the time for redemption until the afternoon of August 24th and for a sufficient length of time thereafter to enable the plaintiff to call on the defendant and make a legal tender to him, when he found that defendant did not keep the agreement to call at his office, but could not be construed as amounting to an agreement to extend such time from August 23d to August 28th. *Ibid.*

VERDICT. See APPEAL, 10. BROKERS. EVIDENCE, 8, 9. NEGLIGENCE, 2. STREET RAILWAYS. TRIAL, 8–11.

VERIFICATION OF CLAIMS. See MUNICIPAL CORPORATIONS, 44.

VOLUNTARY ASSOCIATIONS. See ASSOCIATIONS.

WAIVER. See EXECUTION, 3. FRAUD, 13. INSURANCE, 7. LIMITATION OF ACTIONS. MASTER AND SERVANT, 17. PLEADING, 3.

WAREHOUSEMEN. See CARRIERS, 4.

WARNING SERVANT. See MASTER AND SERVANT, 16, 20, 29–32.

WARRANTY. See DEEDS, 2.

WATERS AND WATERCOURSES. See MUNICIPAL CORPORATIONS, 39–41.

WILLS.

Construction: "Heirs."

1. Unless a contrary intention appears by clear and conclusive evidence, the word "heirs" in a will will be given its technical and correct meaning, as referring to those persons who, at the death of the ancestor named, would be entitled to inherit his real estate under the laws of descent. *Flint v. Wis. Trust Co.* 231

2. Thus, in a devise of land to the testator's sister "for life, remainder to her heirs in fee," the word "heirs" is *held* not to have been used to denote "children" or "heirs apparent." *Ibid.*

3. It is not accurate to speak of a designated person as the heir of another person who is living; but it is accurate to speak of the heirs of a living person when reference is intended to be made to those unknown persons entitled to inherit his real property at his death under the laws of descent. *Ibid.*

Same: Vesting of estates.

4. The rule of law which favors vested estates rather than contingent ones is practically a rule of construction which may have controlling weight in a close or doubtful case, but cannot be invoked to defeat the intent of the testator where that intent is reasonably clear. *Flint v. Wisconsin Trust Co.* 231

Same: "Residue:" Effect of renunciation by widow: Vesting of legacies.

5. A will, after making certain specific bequests, gave the entire residue of testator's estate to trustees to hold for a period of ten years "for the purpose of distributing the residue as hereinafter provided." It then provided for the division of such residue at the end of the ten years, thirty per cent. to his wife and smaller portions to other named legatees. The widow elected to take under the statute. *Held*, that the renunciation by the widow did not cause the thirty per cent. willed to her to become intestate estate, to be paid over to the heir at law, but it remained a part of the residue disposed of by the will, to be distributed among the residuary legatees other than the widow. *Will of Reynolds*, 375

6. The renunciation by a widow of the provision made in her husband's will and election to take under the statute should not be allowed to disturb the will or defeat the intended disposition of his other property, except so far as it necessarily interferes therewith. *Ibid.*

7. Where the widow so renounces, the "residue" of the estate consists of the part of the general estate that remains after deducting debts, specific legacies, and the widow's share; but the intention of the testator as to the disposition of it is to be gathered from the four corners of the will under the facts and circumstances surrounding him. *Ibid.*

8. A stipulation made in settlement of a will contest, but not signed by a charitable institution which was one of the residuary legatees, nor by the guardian *ad litem* of the minor legatees, pursuant to which the widow renounced the provision in her favor and the legacy given to her was to be treated as intestate property, contrary to the true construction of the will, must be disregarded and the will carried out according to its terms, except as necessarily modified by the widow's election. *Ibid.*

9. Under the terms of the will stated above, the gifts to the residuary legatees must be regarded as vested, and only the time of distribution postponed until the expiration of the ten-year period. *Ibid.*

Same: Nature of estate devised.

10. After devising a life estate in all his property to his wife during widowhood, a testator gave the remainder in equal shares to his children "or to the child or children of any deceased child

or children, by right of representation," but further directed that "in case any of my said children shall die without leaving lawful issue them surviving, but leaving a husband or wife them surviving, as the case may be, the share or shares which are hereinbefore given to any of my said children shall revert to my other surviving children, or the child or children of any such surviving child or children, by right of representation." The widow died a few days after the testator. *Held*, that the words "in case any of my said children shall die" referred to a death occurring during the lifetime of the testator or of the life tenant, and that upon her death the surviving children of the testator and the issue of his deceased children, if any, took an absolute estate in fee. *Hohnbach v. Hohnbach*, 487

WITNESSES.

Examination: Employee of adverse party: Re-examination. See CORPORATIONS, 15, 17. DISCOVERY. MASTER AND SERVANT, 18. TRIAL, 2–4.

1. Where an employee of a defendant corporation is called and examined by plaintiff as an adverse witness on the trial, under sec. 4068, Stats. (Laws of 1911, ch. 291), the defendant has a right to re-examine such witness immediately thereafter as to all matters tending to explain or qualify the testimony already given, or may ask the witness questions proper for the purpose of impeachment, upon a statement that it does not thereafter intend to make the witness its witness. *O'Day v. Meyers*, 147 Wis. 549, modified. *Guse v. Power & Mining M. Co.* 400
2. The scope of such re-examination is largely in the discretion of the trial judge, but it should not be extended so far as to cover new matter constituting part of the defense. *Ibid.*
3. The erroneous denial of the right of re-examination of an employee of a party called and examined as an adverse witness under sec. 4068, Stats., is not ground for reversal where it is apparent from the record that such ruling could have had little, if any, effect on the result. *Ibid.*

Cross-examination. See MASTER AND SERVANT, 9, 18. REPLEVIN, 3.

Impeachment. See WITNESSES, 1.

WORDS AND PHRASES.

Contract, in statute. See ACTION, 3.
Division of town, in statute. See SCHOOLS AND SCHOOL DISTRICTS, 3.
Furnish, in statute. See MASTER AND SERVANT, 21.
Heirs, in claim for death. See MUNICIPAL CORPORATIONS, 47.
Heirs, in benefit certificate. See INSURANCE, 5.
Heirs, in will. See WILLS, 1–3.
In case any of my children shall die, in will. See WILLS, 10.
Legal holidays, in bill of lading. See CARRIERS, 4.
Legal representatives, in claim. See MUNICIPAL CORPORATIONS, 47.
Legal title, in statute. See CORPORATIONS, 10.
Lien or interest created, in mortgage. See TAXATION, 1.
Marketable title. See VENDOR AND PURCHASER, 1, 2.
Mechanical contrivance, in statute. See MASTER AND SERVANT, 27.
Mortgage, in mortgage. See TAXATION, 1.
Mother, in benefit certificate. See INSURANCE, 3, 4.
Neglect and refuse, in stipulation. See STIPULATIONS, 1.
Open or rough shadowing. See CONSPIRACY, 3.
Partnership. See PARTNERSHIP, 1, 2.

Person aggrieved, in statute. See EXECUTORS AND ADMINISTRATORS, 6.
Property, in statute. See ACTION, 3.
Repair, in ordinance. See MUNICIPAL CORPORATIONS, 6.
Repairing, in statute. See MASTER AND SERVANT, 26.
Residue, in will. See WILLS, 5, 7.
Scaffolding, in statute. See MASTER AND SERVANT, 27.
Tax, in statute. See MUNICIPAL CORPORATIONS, 25, 26, 28. TAXATION, 6.
Transaction, in statute. See ACTION, 3.
Untenantable, in lease. See LANDLORD AND TENANT, 3.

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